(29,712)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 402

ALPHA PORTLAND CEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF MASSACHUSETTS

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS

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[fol. 1] COMMONWEALTH OF MASSACHUSETTS:

CHIEF JUSTICE'S CERTIFICATE

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Comonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, we well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have hereunto set my hand, and caused the seal of said Court to be hereunto affixed, this twelfth day of June, in the year one thousand nine hundred and twenty-three.

Arthur P. Rugg. (Seal.)

[fol. 2] WRIT OF ERROR—Filed June 7, 1923

UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the county of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between Alpha Portland Cement Company, a corporation duly organized and existing under the laws of the State of New Jersey, Plaintiff and Commonwealth of Massachusetts, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or com-

mission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Alpha Portland Cement Company, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the fifth day of June in the year of our Lord one thousand nine hundred and twenty-three.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

Allowed by: Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts.

[fol. 3] COMMONWEALTH OF MASSACHUSETTS, ss:

And now, here, the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof, I, John F. Cronin, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said court this twelfth day of June, A. D. 1923.

John F. Cronin, Clerk.

[File endorsement omitted.]

[fol. 4] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

To all persons to whom these presents shall come, Greeting:

Know Ye,

That among our Records of our Supreme Judicial Court, sitting at Boston in said County of Suffolk, for the hearing of cases in Equity from the first day of January in the year of our Lord one thousand nine hundred and twenty-one to the eight day of June Nineteen hundred and twenty-three, both days inclusive, it is thus contained: the following being the entire record in the case:

[fol. 5] COMMONWEALTH OF MASSACHUSETTS,
Suffolk County:

Supreme Judicial Court

In Equity

ALPHA PORTLAND CEMENT COMPANY, Petitioner,

v.

THE COMMONWEALTH OF MASSACHUSETTS

RESERVATION

This case is a petition brought under G. L. c. 63, sec. 77, for the recovery of taxes for the year 1921, assessed to the petitioner under the provisions of G. L. c. 63, and St. 1921, c. 361 and 493, and Acts in amendment thereof and in addition thereto, in the sum of $800.45, and claimed to have been illegally exacted. This case came on to be heard before me upon the petition, the respondent's answer, and an agreed statement of facts. Upon the request of the parties I reserve the case for the consideration and determination of the Full Court.

August 22, 1922.

John C. Crosby, J. S. J. C.

IN THE SUPREME JUDICIAL COURT

PETITION

To the Honorable the Justices of the Supreme Judicial Court of Massachusetts sitting in equity within and for the County of Suffolk:

Respectfully represents your petitioner, Alpha Portland Cement Company, as follows:

1. Your petitioner is a foreign corporation organized and existing under and by virtue of the laws of the State of New Jersey, and [fol. 6] is and was at all the times hereafter mentioned engaged extensively in interstate commerce throughout the United States and maintains in the City of Boston, County of Suffolk in the Commonwealth of Massachusetts, a sales office used exclusively for conducting interstate commerce and for no other purpose.

2. The activities of your petitioner within the Commonwealth of Massachusetts are exclusively confined to the solicitation by salesmen engaged by petitioner of orders from customers resident therein and neighboring states, and the transmission of the said orders by mail to the home office of your petitioner located in the city of Easton in the Commonwealth of Pennsylvania, where the said orders are accepted or rejected. Your petitioner entered the Commonwealth of

Massachusetts for the purpose of transacting interstate commerce, and has always strictly confined its operations within the said Commonwealth of Massachusetts to the solicitation of orders as aforesaid and to the execution of said orders when they have been accepted, which acceptance takes place outside of the Commonwealth of Massachusetts as aforesaid, and the shipment of merchandise called for thereby from other states where the good sold are manufactured, produced, or stored by your petitioner into the Commonwealth of Massachusetts or neighboring states, where the purchaser resides, the said point of delivery in every case, however, being different from the state where such transportation begins.

3. The business of your petitioner consists of the manufacture and sale of cement. The sales office maintained by your petitioner within the Commonwealth of Massachusetts is in charge of a district sales manager, who himself solicits orders at the places of business of prospective customers, the only other employee in the said office being a clerk. In addition to the district sales manager, your petitioner employs three salesmen, who solicit orders in the Commonwealth of Massachusetts, and in other states of New England, for cement packed in sacks, bags, or barrels. The orders taken by said salesmen are turned in at the said sales office and forwarded to the home office of your petitioner at Easton, Pennsylvania, where they are accepted or rejected. If the said orders are accepted, the merchandise is shipped from the company's mills, located at Martin's Creek, Pennsylvania, or Alsen, New York, direct to the consumer. Invoices for merchandise so shipped are sent from the principal office at Easton, Pennsylvania, direct to the consumer, and contain a direction that funds in payment therefor be sent direct to your petitioner's home office at Easton, Pennsylvania. In substantially all [fol. 7] cases funds in payment of said merchandise are sent directly by the customer to the said home office of your petitioner at Easton, Pennsylvania. Your petitioner keeps no merchandise in its said sales office located in the city of Boston, or anywhere in Massachusetts, in sample form or otherwise. Your petitioner keeps no bank account in Massachusetts, the office rent and salesmen's salaries being paid direct from your petitioner's home office at Easton, Pennsylvania. Incidental expenses are paid from an impress account of not exceeding $1,000, kept by your petitioner's district sales manager in his own name. Your petitioner keeps no books of record in Massachusetts, nor is any of your petitioner's property located in Massachusetts, other than a few hundred dollars' worth of office furniture located in the aforesaid office. Your petitioner ships no merchandise from one point in Massachusetts to another point in that state, nor from the Commonwealth of Massachusetts to any other state or country. None of your petitioner's stockholders' or directors' meetings are held in Massachusetts, and no officer or agent of your petitioner has any office in Massachusetts, except the district sales manager mentioned.

4. Your petitioner has on several occasions advised the Department of Corporations and Taxation of the Commonwealth of Massa-

chusetts of the details of its activities carried on within the said Commonwealth of Massachusetts, and has steadfastly and repeatedly claimed that its said activities were purely interstate in character, and that your petitioner could not legally be required to pay any excise or tax to the Commonwealth of Massachusetts. Notwithstanding such information so supplied to the said Department of Corporations and Taxation and your petitioner's contention in respect thereto, the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts, on the 17th day of May, 1921, by letter dated that day, informed your petitioner that he had decided that your petitioner was subject to the excise tax law of the Commonwealth of Massachusetts, and demanded, by notice bearing the same date, that your petitioner prepare and file a proper return as provided by the Foreign Corporations Excise Tax Act of the Commonwealth of Massachusetts, and that the said return be filed within twenty days from the date of the said notice, and that upon your petitioner's failure to do so severe penalties would be assessed against it. That in compliance with the said demand, and not as its voluntary act, your petitioner, on the 21st day of June, 1921, made and delivered under protest to the Department of Corporations and Taxation of the Commonwealth of Massachusetts, a report in writing for [fol. 8] the year 1921 in the form prescribed by the said Commissioner of Corporations and Taxation, for the purpose of supplying the said Commissioner with the information demanded by him for the purpose of assessing the excise tax claimed by the said Commissioner to be due under the provisions of chapter 63 of the General Laws. A copy of the said return is hereunto annexed and marked Exhibit "A."

5. That thereafter and on or about the 7th day of July, 1921, the said Department of Corporations and Taxation of the Commonwealth of Massachusetts notified your petitioner, by notice dated that day, that it was the intention of the Commissioner of Corporations and Taxation of said Commonwealth of Massachusetts to assess a tax against your petitioner upon net income in excess of that shown in your petitioner's report for the said year, 1921, for reasons in said notice stated. Your petitioner, in response to said notice and on the 14th day of July, 1921, again protested against any tax being assessed against it, on the ground that it was not doing business in the Commonwealth of Massachusetts and that its activities within that Commonwealth, as explained in the statement annexed to its return for the year 1921, constituted interstate commerce, and that any tax assessed against it would be illegal and void and in contravention of the commerce clause and other clauses of the Federal Constitution; and your petitioner further protested against a tax being assessed against it upon the net income as found by said Commissioner and as shown in the said notice. The said notice of the Department of Corporations and Taxation and your petitioner's response thereto are hereunto annexed and marked respectively Exhibits "B" and "C."

6. That thereafter, and on or about the 20th day of September, 1921, the said Department of Corporations and Taxation of the Commonwealth of Massachusetts made and settled an account against your petitioner for taxes based upon the net income as found by the Commissioner and claimed to be due from your petitioner for the year 1921 under the provisions of chapter 63 of the General Laws and Acts in amendment thereof and in addition thereto, and in accordance with chapters 361 and 493 of the Acts of 1921 for the sum of $800.45, and rendered such account and notice thereof to your petitioner; a copy of said account is hereto annexed and marked Exhibits "D" and "E."

7. Thereafter, and on or about the 19th day of October, 1921, your petitioner paid the said sum of $800.45 to the Commonwealth of Massachusetts and received a receipt for the same, which receipt is in the form of a stamp appearing on the original bills, copies of [fol. 9] which are hereto annexed and marked Exhibits "D" and "E." Your petitioner made the said payment under protest, and a letter of protest dated the 17th day of October, 1921, accompanied such payment; a copy of such protest is hereto annexed and marked Exhibit "F."

8. The said tax assessed against your petitioner and paid under protest is illegal and void for the following reasons:

(a) The imposition of the said tax against your petitioner is in violation of the Constitution of the United States in that your petitioner is denied the rights and privileges assured to it therein and in that the said tax so assessed against your petitioner is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in section 8 of article I of the Constitution of the United States.

(b) That the said tax so assessed against your petitioner by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts is in violation of the Federal Constitution in that it levies a tax upon property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(c) Your petitioner draws in question the validity of said chapter 63 of the General Laws and chapters 361 and 493 of the Acts of 1921 and Acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States in that they levy a tax which is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in section 8 of article I of the Constitution of the United States.

(d) Your petitioner draws in question the validity of said chapter 63 of the General Laws and chapters 361 and 493 of the Acts of 1921 and Acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States in that they levy a tax against property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

[fol. 10] 9. Wherefore your petitioner brings this petition against the Commonwealth of Massachusetts, the respondent herein, pursuant to the provisions of section 77 of chapter 63 of the General Laws, and prays that the aforesaid tax, amounting to $800.45, paid to the Commonwealth of Massachusetts by your petitioner, may be adjudged to have been illegally assessed, and that the amount thereof may be returned to your petitioner by said Commonwealth of Massachusetts with interest from the date of payment, and for such other and further relief as to this Court may seem just.

Dated November 21, 1921.

Alpha Portland Cement Company, Petitioner. By Jno. J. Matthes, Treasurer. [Seal.] Warner, Stackpole & Bradlee, Solicitors. Porter & Taylor, Counsel. 30 Broad Street, New York City.

County of Northampton,
State of Pennsylvania, ss:

John J. Matthes, being duly sworn, deposes and says that he is the treasurer of the petitioner herein: that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true. That the reason why this verification is not made by petitioner is that petitioner is a corporation and deponent is an officer thereof, to wit, the treasurer.

Jno. J. Matthes.

Sworn to before me this 21st day of November, 1921. John G. Taylor, Notary Public, Easton, Pa. Commission expires January 17, 1925. [Seal.]

[fol. 11] State of Pennsylvania,
County of Northampton, ss:

I, Thomas A. L. Hay, Prothonotary of said County, and Clerk of the Court of Common Pleas, in and for said County, do hereby certify, that the said Court is a Court of Record. That John G. Taylor, Esq., whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking the

same a notary public in and for said County and a resident of said County, duly commissioned and sworn, and qualified to act as such; that as such notary public he was at the time of taking such acknowledgment duly authorized by the laws of the State of Pennsylvania to take acknowledgments and proofs of deeds or conveyances for lands, tenements or hereditaments in the State of Pennsylvania, that I am well acquainted with the handwriting of said notary public and verily believe that his signature to the same is genuine. That his commission is dated Jan. 17, 1921, and will expire Jan. 17, 1925.

In testimony whereof, I have hereunto set my hand and affixed the seal of said office, at Easton, this 21st day of November, A. D. 1921.
Thomas A. L. Hay, Prothonotary. [Seal.] Filed November 30, 1921.

(Here follows Exhibit "A" to Petition, marked side folio pages 12, 13, 14, and 15.)

[fol. 16] The annexed report on Form 355 (b) and the schedules annexed thereto for the year 1921 are filed by the Alpha Portland Cement Company under compulsion and under protest and only for the purpose of avoiding the imposition of the penalties provided by the statutes of Massachusetts and in conformity with the demand of the Department of Corporations and Taxation of the Commonwealth of Massachusetts contained in said Department's two letters dated May 17, 1921, one of which is addressed to Louis H. Porter and the other to the Alpha Portland Cement Company. While the report is prepared in conformity with the said ruling of the said Department of the Commonwealth of Massachusetts, the Alpha Portland Cement Company respectfully insists that the decision of the said Department requiring the filing of this return is erroneous and said corporation specifically stipulates that the filing of this return shall not be considered a waiver or abandonment of its rights to contest the validity of the said Departmental ruling and of any tax or fee that may be assessed against the said corporation. The said Alpha Portland Cement Company contends that the Commonwealth of Massachusetts is without power or jurisdiction to assess a tax against it for the reason that the business of the corporation is purely interstate in its character and comes within the protection of the Commerce Clause and other clauses of the Federal Constitution, as the following statement of fact shows:

The Alpha Portland Cement Company is incorporated under the laws of New Jersey for the purpose of manufacturing and selling cement. Its home office is located at Easton, Pennsylvania. The corporation leases in Boston, Massachusetts, an office located at Rooms 619-620, Board of Trade Building, situated at State, Broad, Central and India Streets in said City, which is the only office of the company in Massachusetts. The said office is in charge of a dis-

✓ EXHIBIT "A" for Petition

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THE COMMONWEALTH OF MASSACHUSETTS

Form 355B

1921 FOREIGN BUSINESS CORPORATION EXCISE TAX RETURN

No.

(GENERAL LAWS, CHAPTER 63.)

To be filed within the first ten days of April, 1921, with the Commissioner of Corporations and Taxation, Division of Corporations, State House, Boston.

ISSUED	ASSESSED
VERIFIED	ASSESSED BY

DO NOT WRITE ABOVE THIS LINE

READ INSTRUCTION SHEET

Returned of ALPHA PORTLAND CEMENT COMPANY Manufacture & Sale Portland Cement
(Name of corporation) (Kind of business, Quality to detail)

Post office address Easton, Pa.

Location of principal office First National Bank Bldg., Easton, Penna.
(No. and street, number) (City or Town) (State)

Name of Treasurer Jno. J. Matthews Location of Massachusetts office Board of Trade Bldg., Boston
(Street and street number) (City or Town)

Return of Income for the {Calendar / Fiscal} year ending December 31, 19 20

SCHEDULE A. TAXABLE NET INCOME BEFORE DEDUCTING EXCESS PROFITS REVENUE FOR PERIOD OF ASSESSMENT 1920

GROSS INCOME										
1. Gross sales, less returns and allowances	$ 8	746	230	68						
2. Less cost of goods sold, exclusive of expenses, interest, and other items called for separately below	4	373	899	70	$ 4	372	330	98		
3. Gross income from operations other than trading or manufacturing, less allowances								0		
4. Taxable interest on obligations of the United States and War Finance Corporation Bonds						99	076	33		
5. Taxable interest from all other sources						10	441	89		
6. Rentals								0		
7. Royalties								0		
8. Share of net income earned by personal service corporation during its current taxable period (whether received or not)								0		
9. Dividends on stock of (a) foreign corporations, $; (b) domestic corporations, except personal service corporations from earnings accumulated on or after January 1, 1918, $; total								0		
10. Gross income from all other sources (not including any amount reported in Item 22, below)								0		
11. TOTAL OF ITEMS 1 TO 10									$ 4	481 868 54
DEDUCTIONS										
12. Ordinary and necessary expenses (except amounts reported in Item 8 above or called for separately below)	$ 1	819	489	07						
13. Compensation of officers (including salaries, commissions, and other compensation in whatever form paid)			187	028	43					
14. Repairs (including labor, supplies, etc.)	1	188	082	86						
15. Interest				260	88					
16. Taxes			74	298	21					
17. Debts ascertained to be worthless and charged off within the taxable period			2	804	92					
18. Bad debts, wear and tear (including obsolescence)			263	898	92					
19. Depletion			1	191	12					
20. TOTAL OF ITEMS 12 TO 19									$ 3	815 770 51
21. DEDUCTIONS BETWEEN ITEMS 11 AND 20									1	866 098 03
22. Profit or loss on sales of capital assets and miscellaneous investments, including Liberty bond dividends	$		18	980	00					
23. Losses sustained during the taxable period and not compensated for by insurance or otherwise (attach to last column adjustment of Items 22 and 23)					0				$	18 980 00
24. Net income for taxable period exclusive of deductions for dividends and amortization (total of or difference between Items 21 and 23, the latter as extended)									$ 1	847 118 03
25. Dividends on stock of (a) foreign corporations taxable by the United States on their net incomes, and (b) domestic corporations, except personal service corporations from earnings accumulated on and after January 1, 1918	$				0					
26. Amortization of war facilities (actual total of Items 24 and 25)					0					
27. NET INCOME FOR TAXABLE PERIOD (Difference between Items 24 and 26, the latter as extended)									$ 1	847 118 03

SCHEDULE B. VERIFICATION OR CORRECTION OF SCHEDULE A

(a) Have filing the Federal Return have any errors or inaccuracies in Items 1 to 27 inclusive been discovered? Ans. None

(b) If so, state in detail upon a memorandum hereto annexed what corrections should be made.

(c) Has the Corporation received notice that the assessment made by the Federal Government is based upon a net income greater or less than is reported in Schedule A? Ans. No

(d) If so, state upon a memorandum hereto annexed the amount of net income as computed by the Federal Government upon the latest determination by it of the proper tax, setting forth the facts giving rise to the difference.

Has the corporation received notification of any change in the amount of net income as determined by the Federal Government with respect to any previous year, return of which was required to be made under the laws of this Commonwealth? Ans. No

If so, state for what year or years

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SCHEDULE C. CORPORATE EXCESS

TABLE I — CAPITAL STOCK

	Amount authorized	Amount issued and outstanding Apr. 1, 1921	Amount held in treasury Apr. 1, 1921 (or Investment Stock)	Number of Shares issued Apr. 1, 1921	Par Value per Share	Market Value on
Common	23,000,000	15,799,100.		157,991.	100.00	Not known
1st Pref.	2,000,000	2,000,000		20,000	100.00	" "
2nd Pref.						

If stock is listed on Stock Exchange give name of Exchange Not listed

If stock is not listed on Stock Exchange, state last four sales, giving the information called for in Table II. Do not include "wash" sales.

TABLE II — SALES OF STOCK

	Date of Sale	Number of Shares	Price per Share	Power or Private Sale		Date of Sale	Number of Shares	Price per Share	Power or Private Sale
Com.	All transfers of Alpha stock transactions between individual stockholders, consideration not known.				1st Pref.				
Com.					1st Pref.				
Com.					2nd Pref.				
Com.					2nd Pref.				
1st Pref.					2nd Pref.				
1st Pref.					2nd Pref.				

TABLE III — NET EARNINGS — LAST FIVE YEARS

Year ended —	Net Income (Deficit in red)	Dividends	Assessments	Net Earnings (After Taxes)	Number of Shares	Dividends declared		
						Common	First Preferred	Second Preferred
1916	$	$	$	$ 510,514.31	100,000	2%	7%	%
1917				470,249.53	100,000	3%	7%	%
1918				385,305.42	100,000	3%	7%	%
19.19				938,168.76	100,000	3%	7%	%
19.20				961,686.04	100,000	6%	7%	%
Total				3265,923.07		17%	35%	
Average	$	xxxxxx	xxxxxx	$ 653,184.61		3 2/5%	7%	%

TABLE IV — ASSETS AND LIABILITIES — APRIL 1, 1921

	Assets — Books of Account	Assets — Fair cash Value	Liabilities (actual)	
Real estate	$ 1,267,438.32	$	Capital stock	$ 17,799,100.00
Machinery	7,664,902.89		Mortgages	216,500.00
Furniture, fixtures and tools	12,000.00		Notes payable	0
Autos, trucks and teams	36,208.70		Accounts payable	812,641.95
Merchandise	3,918,076.15		Other liabilities (standing items)	
Notes	31,144.68		Wages	89,505.19
Accounts receivable	621,168.69		Reserves	1,012,445.88
Securities	6,053,616.83		Profit & Loss	1,146,089.91
Cash	121,726.54			
Good Will				
Other assets (standing items)	1,750,000.00			
Total assets	$ 21,076,282.74	$	Total liabilities	$ 21,076,282.74

State any other facts that are material in determining the fair cash value of the shares.....

SCHEDULE C.—Continued

TABLE A — ASSETS EMPLOYED IN BUSINESS WITHIN MASSACHUSETTS (See Instruction Sheet)

	Values April 1, 1922
Real estate	$ None
Machinery	None
Merchandise	None
Other tangible property (office furniture only)	573.00
Portion of bank deposits in this and in other states employed in conduct of business within Massachusetts*	None
Portion of accounts receivable*	None
Portion of patents* $ ..... Portion of good will* $ ..... Total	None
Portion of all other intangible assets employed in Massachusetts (itemize):*	None
Total of assets employed in business within Massachusetts	$ 573.00

TANGIBLE ASSETS EMPLOYED IN BUSINESS OUTSIDE MASSACHUSETTS

City or Town and State	Real Estate (Col. 1)	Machinery (Col. 2)	Merchandise (Col. 3)	Other Tangible Prop. (Col. 4)	Totals of Columns 1 to 4	
Alpha, N.J.						1.
Carrie Creek, Pa.	$	$	$	$		
Canaston, N.J.						2.
Jamesville, N.Y.						
Lansing, Va.						3. 12498626.06
Wyndover, W.Va.	1267438.32	7644902.82	3518076.15	48208.70		
New York city.						4.
Philadelphia, Pa.						
Pittsburg, Pa.						
Baltimore, Md.						
Savannah, Ga.						
Chicago, Ill.						
Trenton, Ohio						
LaSalle, Ill						
Total Bellevue, Mich.	$	$	$	$		$ 12498626.06

INTANGIBLE ASSETS EMPLOYED OUTSIDE MASSACHUSETTS (Itemize below)

Portion of bank deposits employed outside* $ 121726.56 Portion of accounts receivable* $ 652313.31 Total	$ 774039.85
Portion of patents* $ ..... Portion of good will* $ 1750000.00 Total	1750000.00
Portion of all other intangible assets employed outside (itemize):* 2,053,616.83	4053616.83
Total of all assets employed in business whether within or without Massachusetts (include totals above)	$ 21076282.74

*Refer instruction sheet as to apportionment.

TABLE B — TANGIBLE PROPERTY SITUATED WITHIN MASSACHUSETTS (See Instruction Sheet)

City or Town in which Corporation has an Office, Stores or Factory	Col. 2 Real Estate Values April 1, 1922 Exc. Rents	Col. 3 Machinery Values April 1, 1922 Exc. Rents	Col. 4 Merchandise Values April 1, 1922	Col. 5 Other Tangible Prop. Values April 1, 1922 Exc. Rents	Col. 6 Amounts of Columns of Real Estate, Machinery or Other Tangible Property Included in Col. 5
Boston, Massachusetts	$ None	$ None	$ None	$ 573.	$ None
City or Town in which Corporation has an Office, Stores or Factory					
Totals	$	$	$	$	$

NOTE.—In column 2, include works, structures, real estate, poles, underground conduits, wires and pipes owned within the commonwealth and subject to local taxation. In column 5, include *only* such machinery as is owned by the corporation within the commonwealth, and as is *subject to local taxation*. Other machinery owned by the corporation, if any, should be included in column 5.

QUESTION SUPPLEMENTAL TO TABLE B

Does the corporation own no tangible property in Massachusetts, except furniture and equipment reasonably necessary for the use of the clerk or other executive officers of the corporation? Answer... No tangible property except sales office furniture

TABLE C — SECURITIES HELD IN MASSACHUSETTS (Include both Taxable and Non-Taxable)

Col. 1 Amount of Shares or No. of Values Issued	Col. 2 Complete Description of Securities by Name and Class or Issue	Col. 3 Values April 1, 1922	Legal Tax Certain Values
	None	$	
		$	

SCHEDULE D. ALLOCATION OF INCOME

1. Net income as shown in Schedule A as verified or corrected by Schedule B			$1,247,118.03
2. Interest from bonds, notes, etc., of U. S. included in Federal return	$ 99,076.33		
3. Gains from the sale of capital assets exclusive of those described under Item 8 below	0		
4. Total of Items 2 and 3			$ 99,076.33
5. Difference between Items 4 and 1 (enter also in outside column)			$1,148,041.70 $1,148,041.70

Items 6 and 7 to be answered only by Corporations carrying on business solely in Mass.

6. (a) Average fair cash value of machinery owned and used in Mass. $ ..... × Item 5 =			$ .....
(b) Average value of total assets employed in Mass. $			
7. Difference between Items 6 and 5 = amount taxable at 2½%			$ .....

Items 8 to 17 to be answered only by Corporations carrying on business outside Mass.

8. Gains from the sale of tangible capital assets situated within Mass.		None	
9. Interest from: Mass. corporations; associations, partnerships or trusts having transferable shares and having a principal place of business in Mass.; Mass. inhabitants; excepting interest from Trust Companies and from National Banks		None	
10. Total of Items 8 and 9 (enter also in outside column)		$ None	$ 1,148,041.70
11. Difference between Items 10 and 5 = remainder to be allocated			
12. (a) Average value of tangible property in Mass. $ 573.00			
(b) Average value of all tangible property $ 11,735,209.44	× 1/20 of Item 11 =		11.37
13. (a) Wages, salaries, etc., assignable to Mass. $ 11023.60			
(b) Total wages, salaries, etc. $ 2,507,848.20	× 1/20 of Item 11 =		1,007.24
14. (a) Gross receipts assignable to Mass. $ 424982.70			
(b) Gross receipts from all business $ 1,277,475.05	× 1/20 of Item 11 =		12,704.99

*Note.—If only two of above proportions apply, substitute ¼. If only one of above proportions applies, substitute 1. Do not fail to observe instructions on accompanying sheet.

15. Total of Items 12, 13, and 14			$ 14,330.61
16. (a) Average fair cash value of machinery owned and used in Mass.	None		
(b) Average value of total assets employed in Mass. $	× Item 15 =		.....
17. Difference between Items 16 and 15 = amount taxable at 2½%			$ 14,330.61
18. (a) Total dividends paid Massachusetts inhabitants for year ending Dec. 31, 1920 $ 84	(b) 5% of same	(To Income Sheet)	$ 4.20

SUPPORTING SCHEDULES

The following schedules, where applicable, must be made in support of Schedule D, and firmly attached to this Return:

SCHEDULE D 2 and 3: Submit a detailed schedule of capital assets sold (not stock in trade), describing same and giving location of such of said assets as are tangible.

SCHEDULE D 12: In this schedule state the method used in determining the average values used in Items 12 (a) and (b).

SCHEDULE D 13: In this schedule specify the location of the premises to which wages are assignable and the amount assigned to each such place, whether within or without Mass.

SCHEDULE D 14: In this schedule state amounts of sales and receipts assigned to each place of business, whether within or without Mass.

SCHEDULE D 6 (b) or 16 (b): Submit a schedule describing the assets and stating their value and location.

SUPPLEMENTAL STATEMENT.

No part of the debts of this corporation as set forth in this return has been incurred nor has any office, warehouse or other place of business been maintained in a state other than this commonwealth for the purpose of reducing the amount of taxes to be paid by said corporation.

The corporation, during the year above reported for, rented premises outside Massachusetts at the following places, and the premises were first rented to the corporation at or about the date set after the name of each such place:—

.....

.....

AFFIDAVIT.

I, the treasurer (or *other principal officer*) of the above-named company, being duly sworn, make oath that I have carefully examined the foregoing return, and I further make oath to the best of my knowledge and belief, and from such information as I have been able to obtain, that the items of income as set forth in Schedule A are a true copy of such items as they were included in the balance of income due prior to April 1, 1921, and made to the Collector of Internal Revenue, that as modified as corrected by Schedule B, said items are true and accurate statements and that all other items, statements and all schedules in this return contained, including the accompanying schedules and statements, are true and accurate in each and every particular.

(Signature of treasurer or other principal officer) ..... Jno. J. Matthes .....

(Title of office, as for example "Treasurer") ..... Treasurer .....

Subscribed and sworn to before me, this ..... 20th ..... day of ..... June ..... 1921.

..... John G. Taylor .....
Notary Public —*Justice of the Peace* —
Special Commissioner Boston.

(SEAL)

My commission expires ..... JANUARY 17, 1926 .....

trict sales manager, who himself travels in other States, the only other employee therein being a clerk. The salesmen, four in number, including district sales manager, solicit orders in Massachusetts and in other New England states for cement, packed in sacks, bags or barrels. The orders taken by said salesmen are turned in at said office and then forwarded to the home office of the company at Easton, Pennsylvania, where they are accepted or rejected. If accepted, the merchandise is shipped from the Company's mills located at Martins Creek, Pennsylvania, or Alsen, New York, direct to the consumer. The invoices are sent from the principal office at Easton, Pennsylvania, direct to the consumer and contain a direction that funds in payment be sent direct to Easton. No merchandise is kept in said office located in Boston or anywheres in Massachusetts in [fol. 17] sample form or otherwise. Orders are taken by solicitation at the customer's premises, or are sent by mail. Payments for merchandise are sent by the customer direct to the principal office at Easton, Pennsylvania, the exception being delinquent accounts, which salesmen may at times be instructed to collect. This however, is the exception to the general practice and does not occur frequently. The company keeps no bank account in Massachusetts. The office rent and salesmen's salaries are paid direct from Easton. Incidentals are paid from an impress account of not exceeding $1,000 kept by the district sales manager in his own name. No books of record are kept in Massachusetts. No property of any kind is owned in Massachusetts other than a few hundred dollars worth of office furniture located in the aforesaid office. No merchandise is shipped from one point in Massachusetts to another point in that State, nor from Massachusetts to any other State or country. No meetings of stockholders or directors are held in Massachusetts and no officer or agent of the company has an office in Massachusetts, except the district sales manager above mentioned.

Explanation of Computations in the Accompanying Report

The Alpha Portland Cement Company's Federal Income Tax Return covering the year 1920 was a consolidated Return, the other company participating in the said Return being the Alpha Portland Cement Company of Pennsylvania.

Schedule C—Table A

First Section

The only assets which the corporation has in Massachusetts are the articles of office furniture located in the Boston office, which office, however, is used only for the salesmen as described above. The value of the said office furniture is $573.00. The entire expenses of the said office and the salesmen's salaries are paid from the company's office at Easton, Pennsylvania, the only funds

in Massachusetts being an impress account kept by the district sales manager in his own name and which does not exceed $1,000.00.

Question Supplemental to Table B

The company owns no tangible property in Massachusetts except the office furniture mentioned above. The office in which the furniture is located is under the supervision of the district sales manager [fol. 18] and no officer of the corporation uses the said office.

Schedule D, Item 12

The average value of all the tangible property of the corporation was computed by averaging the monthly balances for the year giving as the result $7,235,209.40. To this amount was added $4,500,000.00 the investment of the Alpha Portland Cement Company in the stock of the Alpha Portland Cement Company of Pennsylvania, a subsidiary company, through which the Alpha Portland Cement Company owns certain properties within the state of Pennsylvania. By the laws of Pennsylvania, the Alpha Portland Cement Company being a New Jersey corporation is limited in its holding of real property in Pennsylvania, and because of this limitation the title to the Alpha Portland Cement Company's mills in that state is vested in the Alpha Portland Cement Company of Pennsylvania, all of the stock of which is owned by the Alpha Portland Cement Company. The latter company operates those mills in Pennsylvania and derives all the income therefrom, all of the revenue going direct to it, the Alpha Company crediting the subsidiary company with a nominal sum as rent to cover depreciation. Since the income from the Pennsylvania real estate is included in the income in this report, the said $4,500,000.00 representing the value of the said Pennsylvania real estate should be included in the value of all the tangible property of the company, as shown in Schedule D, item 12(b). The New York Court of Appeals held that an assessment ignoring the value of properties under the conditions and at the same time including the income therefrom is unconstitutional in People ex rel. Alpha Portland Cement Company v. Knapp, 230 N. Y. 48. A petition to the Supreme Court of the United States for a writ of certiorari to the Court of Appeals has been denied. Item 12(b) has, therefore, been taken as $11,735,209.40.

Schedule D, Item 14

The New England salesmen cover not only the state of Massachusetts but most of the New England states, and the salaries paid to them for the period covered by this report amounted to $17,780.00. The Alpha Portland Cement Company contends that it is not doing business in Massachusetts and it is clear that in no event could more than that proportion of the salesmen's salaries be charged to the Massachusetts business than the percentage of the gross receipts from [fol. 19] Massachusetts purchasers to the gross receipts from the

New England sales, which amounted to $680,681.93. Schedule D, Item 13(a) is therefore $11,023.60.

Dated, June 16th, 1921.

Alpha Portland Cement Company, By Jno. J. Matthes, Treasurer.

EXHIBIT "B" TO PETITION

The Commonwealth of Massachusetts

Department of Corporations and Taxation

237 State House, Boston

Divisions of Corporations

Henry F. Long, Commissioner

Harold S. Lyon, Director

July 7, 1921.

To Alpha Portland Cement Co.,
First National Bank Bldg.,
Easton, Penna.:

Notice of Intention to Assess Income in Excess of that Reported in Return

You are hereby notified, in accordance with the provisions of Chapter 63 of the General Laws, that the taxable net income of the above corporation appears to be in excess of the income shown in Schedule D of its excise tax return for 1921.

It is the intention of the Commissioner of Corporations and Taxation to assess a tax upon the amount stated on the back of this form for the reasons there set forth, at the expiration of ten days after date of this notice, during which time a representative of the corporation is given an opportunity to confer as to the proposed assessment and to explain the apparent incorrectness of the return.

This notice must be returned with any statement desired to be submitted (use the back of this form) or presented in every case where a conference is desired. If the corporation is to be represented [fol. 20] by counsel or otherwise the blank below must be filled in and signed by the treasurer or other principal officer.

Respectfully Yours, Harold S. Lyon, Director of the Division of Corporations, By H. G. D.

The Commissioner, his deputies, clerks and assistants are authorized to disclose the contents of the excise tax return of this corporation to the following-named representative:

(Name of representative:) Louis H. Porter.

(Name of corporation:) Alpha Portland Cement Company.

(Signature of treasurer, or other principal officer:) Jno. J. Matthes (Title of office, as for example, "Treasurer"), Treasurer.

Return This Form

Amount of Increase		$1,039.44
Income as determined	$15,370.06	
Income per return	14,330.62	
	$1,039.44	

Reasons for proposed assessment:
Schedule D, items 12 and 13 refigured as follows:

$$\text{Item 12 } (a)\ \frac{573.00}{(b)\ 7{,}235{,}209.40} \times 382{,}680 = 30.30.$$

$$\text{Item 13 } (a)\ \frac{17{,}780}{(b)\ 2{,}607{,}862.20} \times 382680.56 = 2{,}609.05$$

There seems to be an error in computing this item 14. New computation as follows:

$$14\ (a)\ \frac{424982.70}{12{,}774{,}825.05} \times 38268.56 = 12{,}730.71.$$

Statement of Corporation.
Signed: —— ——.
Title of Office: ——.
No. —; street, ——.
Date: —— —, 19—.
City or Town: ——.
Address reply attention of Mr. —— ——.

[fol. 21] EXHIBIT "C" TO PETITION

To the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts:

The Alpha Portland Cement Company, for the reasons hereinafter stated, among others, objects to the assessment of any tax upon it by the Commonwealth of Massachusetts and further objects to the assessment of a tax based upon a net income as found by the Commissioner of Corporations and Taxation of said Commonwealth and set forth in the notice of the said Commissioner dated July 7, 1921 addressed to the Alpha Portland Cement Company, which net income is different from that shown by the Company in its 1921 return.

The Alpha Portland Cement Company objects to the assessment of any tax upon it for the reason that it is not doing business in Massachusetts and that its activities as explained in the statement annexed to its return for 1921 constitute Interstate Commerce as defined by many decisions of the Courts of Massachusetts and of the United States and that the assessment of any tax against it is illegal being in

violation of the Commerce Clause and other clauses of the Federal Constitution.

The Alpha Portland Cement Company further objects to the changes in its net income made by the Department of Corporations and Taxation as shown in its letter dated July 7, 1921 for the following reasons.

(*a*) The deduction of $4,500,000 from the denominator of item 12 on page 4 of the return the said $4,500,000 being the value of the investment of the Alpha Portland Cement Company in the stock of Alpha Portland Cement Company of Pennsylvania under the circumstances as set forth in the Statement attached to the return, renders any tax assessed on a net income so found illegal and void and in violation of the 14th amendment and other provisions of the Federal Constitution.

(*b*) The increase in the numerator of item 13, on page 4 of the return so as to cause the said numerator to show the total salaries of the New England salesmen of the Alpha Portland Cement Company instead of that proportion of said salaries attributed to Massachusetts alone as set forth in the said Company's return and in the Statement attached thereto, is illegal and in violation of the provisions of the Federal Constitution.

Dated, July 14, 1921.

Louis H. Porter, Attorney for Alpha Portland Cement Company.

[fol. 22] EXHIBIT "D" TO PETITION

No. 58.9

Foreign Business Corporation

Department of Corporations & Taxation

Division of Corporations

Room 237, State House

[SEAL.]

Boston, September 20, 1921.

To the Treasurer of Alpha Portland Cement Co.,
First National Bank Bldg.,
Easton, Pa.:

Your excise due The Commonwealth of Massachusetts, in accordance with the provisions of chapter 63, General Laws, and Acts in Amendment thereof and in Addition thereto and in accordance with chapter 361 of the Acts of 1921, is as follows:—

Corporate Excess (April 1, 1921) $84,001.21		
Taxable at $5 per $1,000	.....	$420.01
Net Income $15,370. Taxable at 2½ per cent..	$384.25	
Less 5 per cent of Dividends Paid Massachusetts Inhabitants	4.20	
		$380.05
Minimum Tax		.....
Penalties for late filing of return		.....
Total Amount of Tax Due		$800.06
Abated		.....
Net Tax		.....
Interest		.....
Amount Paid		$.....

——— —, 1921.

Send this bill with check payable to The Commonwealth of Massachusetts to the Treasurer of the Commonwealth, Room 227, State House, Boston, Mass.

Notice is hereby given that the above amount will be due and payable, at the Treasurer's Office, Room 227, State House, thirty days from date hereof. Applications for abatement or correction of tax must be made to the Commissioner thirty days from the date of this notice. To avoid interest the tax should be paid when due. [fol. 23] Six per cent interest will be charged if tax is not paid when due: 12 per cent if payment is delayed until proceedings are commenced.

Treasurer's office hours, 9 A. M. to 2 P. M. Saturdays 9 A. M. to 12 M.

Henry F. Long, Commissioner.

[Stamp:] Received Payment. G. Comm. of Mass. Oct. 20, 1921. James Jackson, Treasurer & Rec. Gen'l. [Across face:] Paid under Protest.

EXHIBIT "E" TO PETITION

(Foreign Corporation)

58.9

Send this bill with payment of the Tax to Treasurer of the Commonwealth, Room 227, State House.

The Commonwealth of Massachusetts

Division of Corporations

Department of Corporations & Taxation

Room 237, State House

[SEAL.]

BOSTON, September 20, 1921.

To the Treasurer of Alpha Portland Cement Co.,
First National Bank Bldg.,
Easton, Pa.:

Your tax on net income as reported in your tax return in accordance with the provisions of chapter 493, of the Acts of 1921, is as follows:

Tax on $52.63 ..... $.39

Rate ¾ of 1%.
Payable October 20, 1921.

[fol. 24] Extra Tax

1921

You are hereby notified that the above amount will be payable at the Treasurer's Office, Room 227, State House, on or before October 20, 1921. You are further notified that within ten days from the date hereof, said corporation may apply to The Commissioner of Corporations and taxation for a correction of the above tax.

To save interest the tax should be paid when due. Six per cent interest will be charged if tax is not paid when due.

Checks should be payable to the order of the Commonwealth of Massachusetts.

Treasurer's Office Hours, 9 A. M. to 2 P. M. Saturdays 9 A. M. to 12 M.

Henry F. Long, Commissioner.

EXHIBIT "F" TO PETITION

Alpha Portland Cement Company

Treasury Department: Jno. J. Matthes, Sec'y-Treas. F. G. Lyons, Auditor.

Sales Offices: New York, Philadelphia, Boston, Pittsburgh, Baltimore, Savannah.

Plants: Alpha, N. J.; Manheim, W. Va.; Martins Creek, Pa.; Clementon, N. Y.; Jamesville, N. Y.

General Offices: Easton, Pa.

In your reply please refer to File No.

October 17, 1921.

Treasurer of the Commonwealth of Massachusetts,
Room 227, State House,
Boston, Mass.

DEAR SIR:

Enclosed please find check of the Alpha Portland Cement Company in payment of the tax assessed against it for the year 1921 by The Commonwealth of Massachusetts, amounting to $800.45 as shown by the enclosed bill. This check is sent and the said tax is [fol. 25] paid under protest and the Alpha Portland Cement Company reserves the right to contest the validity of the said tax.

Yours very truly, Alpha Portland Cement Company, By Jno. J. Matthes, Treasurer.

"Concrete for Permanence."

IN SUPREME JUDICIAL COURT

ANSWER OF RESPONDENT, COMMONWEALTH OF MASSACHUSETTS—Filed January 11, 1922

The respondent, Commonwealth of Massachusetts, for answer to the petition in the above cause, says as follows:

1. The respondent admits that the petitioner is a foreign corporation organized and existing under and by virtue of the laws of the State of New Jersey. It is ignorant as to the extent to which the petitioner is engaged in interstate commerce throughout the United States, and leaves the petitioner to prove the same so far as material. It admits that the petitioner maintains an office in the city of Boston in this Commonwealth. It denies that said office is used exclusively for conducting interstate commerce, and says that said office is a usual place of business of the petitioner.

2. The respondent admits that the petitioner, by salesmen engaged by it, solicits orders from customers resident in Massachusetts and neighboring states and that it transmits such orders from its office in Massachusetts to its office at Easton in the Commonwealth of Pennsylvania. The respondent denies that the petitioner's activities within the Commonwealth are exclusively confined to such solicitation and transmission, that the petitioner has confined its operations within this Commonwealth to the solicitation and execution of orders, that all said orders are accepted or rejected at Easton in the commonwealth of Pennsylvania, and that acceptance of all orders takes place outside Massachusetts. The respondent is ignorant as to the purpose for which the petitioner entered this Commonwealth, and leaves the petitioner to prove the same if material. It denies all other allegations contained in said paragraph.

3. The respondent admits that the business of the petitioner consists of the manufacture and sale of cement, that the business here [fol. 26] is conducted by employees, and that the business here is conducted as admitted by paragraph 2 of this answer. It denies all other allegations of paragraph 3 of the petition.

Further answering the respondent says that the petitioner has property located in Massachusetts, ships merchandise to residents of Massachusetts, solicits and negotiates sales from its place of business in Massachusetts, conducts correspondence and pays expenses at said place of business, and performs and carries on in this Commonwealth divers other functions and activities incident to its business of manufacturing and selling cement.

4. The respondent admits that, notwithstanding the petitioner's contention that it was not taxable, the Commissioner of Corporations and taxation on May 17, 1921, notified the petitioner of its failure to file a tax return and in said notice called attention to the statutory penalties for such failure, and that the petitioner on June 22, 1921, and not on June 21, 1921, as alleged, filed a return in substantially the form set forth in Exhibit A annexed to the petition.

5. The respondent admits the allegations of paragraph 5 of the petition.

6. The respondent admits that taxes were assessed to the petitioner, as alleged in paragraph 6 of the petition. The respondent further says that the taxes so assessed were in every respect legal and valid.

7. The respondent admits the allegations of paragraph 7 of the petition.

8. The respondent denies the allegations of paragraph 8 of the petition.

Commonwealth of Massachusetts, By Alexander Lincoln, Assistant Attorney-General.

[File endorsement omitted.]

IN SUPREME JUDICIAL COURT

AGREED STATEMENT OF FACTS—Filed Aug. 18, 1922

The Alpha Portland Cement Company having filed two petitions pursuant to section 77 of chapter 63 of the General Laws praying for the recovery of taxes paid to the Commonwealth of Massachusetts and assessed in the first case for the year 1920 under the provisions of chapter 355 of the Acts of 1919 and chapters 550 and 600 of the Acts of 1920, and in the second case for the year 1921 under the provisions of chapter 63 of the General Laws and chapters 361

and 493 of the Acts of 1921, and the respondent having filed answers to each of the said petitions, it is agreed that in each of the said actions the facts hereinafter stated may be taken as true, and the [fol. 27] Court may draw inferences from the facts stated. The pleadings, consisting of the petition dated August 26, 1921, as amended by permission of the Court on November 29, 1921, and the answer thereto, and the petition dated November 21, 1921, and the answer thereto, may be referred to as the questions of law involved.

(1) The petitioner, Alpha Portland Cement Company, is a corporation organized and existing under the laws of New Jersey. Its principal office is located at Easton, Pennsylvania. The petitioner is engaged in the manufacture and sale of cement, and has mills located in the States of New York, Pennsylvania New Jersey, West Virginia, Ohio, Illinois and Michigan. Cement packed in sacks, bags, or barrels is shipped from these mills to various points in the United States and foreign countries both by rail and water.

(2) The petitioner's activities within the Comonwerlth of Massachusetts are as follows: It leases two rooms in the Board of Trade Building situated at State, Broad, Central, and India Streets, in the City of Boston, which is the only office of the petitioner in Massachusetts. The said office is in charge of a district sales manager, the only other employee therein being a clerk. This clerk is a stenographer and typist, and as such writes such letters as are sent out from the Boston office. He makes up the orders that are turned in at the Boston office, as explained herein, on certain forms which the company has for its business and encloses them in an envelope addressed to the Easton office, where they are accepted or rejected. He keeps a record of shipments into the New England territory. He receives from Easton copies of all the invoices covering material shipped to any customer in the New England states and enters them on a card of record, and periodically turns this information over to salesmen in whose territory shipments have been made. He of course looks after such additional duties as are consistent with any office. The office is used as headquarters by traveling salesmen employed by petitioner, who are four in number, including the district sales manager, who himself travels. These salesmen solicit orders in the Commonwealth of Massachusetts and in other New England states for cement manufactured by petitioner. Orders taken by the salesmen are turned in at said sales office and are then forwarded by mail to the principal office of the company at Easton, Pennsylvania. When the orders so forwarded reach the principal office they are either accepted or rejected. If accepted, the merchandise called for is shipped from the petitioner's mills, located at Martin's Creek, Pennsylvania, or Alsen, New York, direct to the customer. When shipment is made, invoices are prepared at the principal office at Easton, [fol. 28] Pennsylvania, and mailed directly to the customer. The invoices contain a direction that funds in payment be sent directly to the principal office. In substantially all cases the orders are taken by the salesmen upon personal solicitation at the customer's place

of business, but there are also a few instances in which the customer forwards the order by mail to the Boston office, and a few very exceptional cases where a customer gives an order at the Boston office. In every case, however, the orders are forwarded to the principal office at Easton, Pennsylvania, for acceptance or rejection. In no case and under no circumstances are any orders accepted or rejected by the Boston office. Funds in payment for the merchandise shipped are sent by the customer to the principal office at Easton, Pennsylvania, as above stated, but in cases of delinquent accounts or bad credit risks, the credit department at Easton, in approving the contract, sometimes sends word to the salesmen that such an order would only be shipped upon receipt of check in advance. In that case the salesman calls again on the customer and explains the situation and in some instances receives a check. The salesman sends it first to the Boston office, from where it is transmitted to the main office at Easton; or if there is any hurry, the salesman sends the check direct to Easton. In no case is the check made payable to salesmen, but is always payable to the Alpha Portland Cement Company, and is deposited by it at its Easton office. In case of some overdue accounts salesmen are sometimes authorized to request and receive payment. The latter cases are compartive rare and are exceptions to the ordinary course of business, but when funds are so collected by salesmen they are forwarded to the principal office at Easton, Pennsylvania.

(3) No merchandise is kept in the said sales office in sample form or otherwise, nor in any part of the Commonwealth of Massachusetts. None of the merchandise sold to customers is produced or purchased in Massachusetts, all of it being produced in the petitioner's mills at Alsen, New York, or Martin's Creek, Pennsylvania, and shipped from one of the said mills to the customer. No shipments are made from one point in Massachusetts to another point in that Commonwealth, nor from a point in Massachusetts to a point outside of that Commonwealth. The only property owned by petitioner in the Commonwealth of Massachusetts, real or personal, is the office furniture in the sales office, valued at about $500. No bank account is kept in Massachusetts. The salesmen's salaries and office rent are sent directly from the principal office at Easton, Pennsylvania. Incidental expenses in Massachusetts are paid from an account [fol. 29] kept by the district sales manager in his own name, which does not exceed $1,000. Stockholders', directors'' or other corporate meetings have never been held in Massachusetts, and no officer or agent of petitioner has an office there except the district sales manager's office, above specified. No books or records are kept in Massachusetts except as above noted.

(4) The above facts as to the activities of the petitioner within the Commonwealth of Massachusetts were submitted to the Department of Corporations and Taxation of the Commonwealth of Massachusetts in March, 1920, and at other times. On May 17, 1921, the said Department, by letter dated that day addressed to petitioner's

attorneys, decided that the petitioner was subject to the excise tax law and must pay the tax provided therein. By letter May 17, 1921, the said Department notified the petitioner that it must file excise tax returns within twenty days of the date of said notice and that in default thereof penalties would be assessed against it. Petitioner subsequently, and on June 21, 1921, forwarded its returns for the years 1920 and 1921, and filed the same under protest with the Department of Corporations and Taxation. Petitioner stated in schedules annexed to said returns that it was not liable for any tax for the reason that no business was transacted in Massachusetts within the meaning of the excise tax law. The said returns and schedules are annexed to the petitions as "Exhibit A" and are made a part of this agreed statement of facts.

(5) On July 6, 1921, the Commonwealth of Massachusetts assessed a tax against petitioner under the provisions of chapter 355 of the General Laws of 1919, amounting to $975.86, and an additional tax under chapter 550 and 600 of the Acts of 1920, amounting to 53¢, the total tax assessed being $976.39. The petitioner paid said tax on August 4, 1921, under protest.

(6) On September 20, 1921, the Commonwealth of Massachusetts assessed a tax against petitioner under the provisions of chapter 63 of the General Laws and chapter 361 of the Acts of 1921, amounting to $800.06, and an additional tax under chapter 493 of the Acts of 1921, amounting to 39¢, the total tax assessed being $800.45. Petioner paid said tax on October 20, 1921, under protest.

(7) Pursuant to section 77 of chapter 63 of the General Laws, petitioner filed its petition for the recovery of the taxes so paid within six months from the date of payment.

(8) The amount of the tax assessed is not questioned, but may be referred to as bearing on the questions of law presented. No question of valuation is involved.

Warner, Stackpole & Bradlee, Attorneys for Plaintiff. Alexander Lincoln, Assistant Attorney-General.

[fol. 30] [File endorsement omitted.]

Copy.

Attest, —— ——, Clerk.

[fol. 30½] [File endorsement omitted.]

[fol. 31] And afterwards, to wit, on the sixteenth day of April, A. D. Nineteen hundred and twenty-three it was ordered by our said Supreme Judicial Court for the Commonwealth, viz:

[fol. 32] COMMONWEALTH OF MASSACHUSETTS:

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH AT BOSTON, APRIL 16, 1923

RESCRIPT—Filed April 16, 1923

In the case of

[Title omitted]

pending in the Supreme Judicial Court for the County of Suffolk, ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz., Petition dismissed with costs.

By the Court, Walter F. Frederick, Clerk. April 16, 1923.

[fol. 33] [File endorsement omitted.]

[fol. 34] And said rescript was entered in our said Court accordingly.

Whereupon the parties appeared, and further hearing being had upon the rescript the following Final Decree was entered by our said Court, viz:

[fol. 35] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

[Title omitted]

FINAL DECREE—Filed May 22, 1923

The above entitled cause came on to be further heard after rescript from the Full Court, and upon consideration thereof it is

Ordered, adjudged and decreed that the petition be and it hereby is dismissed with costs to the respondent taxed in the sum of $28.64.

By the Court, John H. Flynn, Asst. Clerk. May 22, 1923.

[File endorsement omitted.]

[fol. 36] All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Court to be hereto affixed.

Witness, Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston, this twelfth day of June in the year of our Lord one thousand nine hundred and twenty-three.

John F. Cronin, Clerk. (Seal.)

[fol. 37] COMMONWEALTH OF MASSACHUSETTS:

SUPREME JUDICIAL COURT

OPINION

Boston, June 11, 1923.

I certify the annexed to be a true copy of the opinion of the Supreme Judicial Court in the case of Alpha Portland Cement Co. vs. Commonwealth, decided on the 16th day of April, 1923.

Ethelbert V. Grabill, Reporter of Decisions.

[fol. 38] RUGG, C. J.:

This is a petition under G. L. c. 63, s. 77, by a foreign corporation having a place of business in this Commonwealth for the abatement of taxes which it contends were illegally exacted for the year 1921. The petitioner is a corporation organized under the laws of New Jersey. Its business is the manufacture and sale of cement. Its principal office is at Easton, Pennsylvania. Its mills are located in several other States outside of Massachusetts, from which shipments are made to various parts of the United States and to foreign countries. It maintains an office in Boston in charge of a district sales manager, with a clerk, where its correspondence and other natural business activities in connection with the receipt of orders and shipments of goods for the New England States are conducted. The office is used as headquarters for traveling salesmen, who solicit orders in Massachusetts and the other New England States. Orders [fol. 39] so taken are transmitted at the Boston office by mail to the principal office at Easton, Pennsylvania, where exclusively they are passed upon, and if accepted, the goods are shipped and invoices sent directly to the customer. Remittances usually are made to the petitioner at Easton, though in exceptional instances prepayments or collections are made by the salesmen and immediately transmitted to Easton. No samples or other merchandise are kept in this Commonwealth. The only property of the petitioner in Massachusetts is its office furniture, valued at $573. It maintains no bank account here, its salaries and office rent being paid from its principal office. Incidental expenses are paid from an account not exceeding $1,000 kept by the district sales manager in his own name. No corporate books, records, or meetings are in Massachusetts. There is no controversy as to the facts, valuations or computation of the tax. The issues between the parties relate solely to the correct interpretation of our corporate tax law as to foreign corporations and to the constitutionality of that law in its application to the petitioner.

The tax here in question was assessed under our corporation tax law now embodied in G. L. c. 63, and a slight additional tax under St. 1921, c. 493. The record shows that the amount of the tax was not affected by St. 1921, c. 361.

Domestic and foreign business corporations as distinguished from banking and insurance corporations and from public service corpo-

rations are defined and provision made for their taxation in G. L. c. [fol. 40] 63, s. s. 30 to 43, those relating particularly to foreign corporations being s.s. 39 to 43. See also s. 52. These relevant sections and St. 1921, c. 493, are printed in the margin.

It is manifest from an examination of these sections (first enacted in St. 1919, c. 355, that the Legislature, departing from earlier corporation tax laws, has attempted to adopt a general principle whereby domestic and foreign corporations shall be treated with fairness on the same footing as to taxation. These sections constitute an effort on the part of the General Court to avoid on the one hand a basis for taxation of foreign corporations offensive to limitations imposed upon the power of the State by the Constitution of the United States, International Paper Co. v. Massachusetts 246 U. S. 135, Cheney Bros. Co. v. Massachusetts, Id. 147, and to minimize on the other hand the preferences in favor of foreign corporations revealed by the practical operation of corporation tax laws hitherto in force. S. S. White Dental Manuf. Co. v. Commonwealth, 212 Mass. 35, 48, 49. Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, 52. This tax law, placing as it does both domestic and foreign corporations on common ground as to taxation except so far as essential differences require different treatment in details, follows the policy established in this Commonwealth for many years of levying an excise instead of a property tax on corporate franchises and corporate transaction of business. Eaton, Crane & Pike Co. v. Commonwealth, 237 Mass. 523.

The general scheme of this tax law is that an excise is levied on both domestic and foreign business corporations doing business in this Commonwealth. Real estate and machinery used in manufacture of such corporations alone are subject to a local property tax in the city or town where situated. All other personal property, [fol. 41] whether tangible or intangible is exempt from direct or local taxation. The amount of the excise tax is measured as to a foreign corporation, s. 39, by the sum of "an amount equal to five dollars per thousand on the value of the corporate excess employed by it in the Commonwealth," and "an amount equal to two and one-half per cent of that part of its net income as defined in section thirty and in this section, which is derived from business carried on in this Commonwealth," with a further provision that a minimum tax of not less than one-twentieth of one per cent of such proportion of the fair cash value of its shares of capital stock as its assets employed in business in this Commonwealth bear to its total assets employed in business. "Corporate excess employed within the Commonwealth" by a foreign corporation is defined by s. 30, 4, to be such proportion of the fair cash value of all its shares of capital stock as the value of its real and personal assets employed in business within the Commonwealth bears to the value of its total assets on a specified date less the value of (a) real estate and machinery with other structures not here material owned by it within the Commonwealth and subject to local taxation, and (b) securities held within the Commonwealth, the income of which if held by a natural per-

son would not be subject to taxation with certain exceptions. "Net income" means in general the net income for the taxable year required to be returned to the Federal government by the Federal revenue act of nineteen hundred eighteen, less interest received on bonds, notes and certificates of indebtedness of the United States. s. 30, 5.

The statute is an attempt to measure the excise on foreign corporations solely by the property and net income fairly attributable [fol. 42] to the business done within this Commonwealth. This excise tax is in place of any other tax on personal property within the Commonwealth from which, except as to machinery used in manufacture or in supplying and distributing water, foreign corporations (and also domestic corporations) are expressly exempted by G. L. c. 59, s. 5, Sixteenth. Comparison of the sections of the tax act relating to the taxation of domestic corporations with those relating to foreign corporations shows that the same general definitions, exemptions and principles are followed as to both, except as the inherent differences as to domicile and as to allocation of residue of net income and of corporate excess require dissimilar provisions.

It is rightly conceded by the attorney general that the petitioner was engaged in this Commonwealth exclusively in interstate commerce. Marconi Wireless Telegraph Co. v. Com. 218 Mass. 558, 567 to 569. Cheney Bros. Co. v. Mass. 246 U. S. 147, 153.

The question to be decided is whether a foreign corporation having a usual place of business in this Commonwealth used for interstate commerce alone is subject to taxation under the tax law. The precise point now presented for decision was left open in Judson Freight Forwarding Co. v. Commonwealth, 242 Mass. 47, although the act in general was there held to be constitutional.

As matter of verbal construction it is plain that the tax law includes a foreign corporation such as the petitioner. Confessedly the petitioner "has a usual place of business in the Commonwealth" and is actually carrying on business here. The petitioner comes within the description of s. 30, 2, where foreign corporation is defined as including every corporation "chartered under laws other [fol. 43] than those of this Commonwealth for purposes for which domestic corporations may be organized under chapter one hundred fifty-six, which has a usual place of business in this Commonwealth." whether these statutory words are to be interpreted so as to include foreign corporations engaged here exclusively in interstate commerce depends upon the further inquiry whether as thus construed the statute would be constitutional. Attorney General v. Electric Storage Battery Co. 188 Mass. 239, 240, 241. Baltic Mining Co. v. Commonwealth, 207 Mass. 381, 390. This controversy can be settled finally only by the Supreme Court of the United States. But it must be dealt with by this court and considered in the light of decisions of that tribunal, as we understand them.

The present tax act differs in its essential characteristics from those hitherto enacted respecting foreign corporations. The effect of St. 1903, c. 437, s. 75 and St. 1909, c. 490, Part III, s. 56, was to impose excises which prescribed the terms and conditions on which

foreign corporations could do business within the Commonwealth, and which were in the nature of license fees as conditions precedent to the doing of such business. They were taxes upon the privilege of having an establishment for business in Massachusetts. They were not property taxes. The right to do business depended upon the payment of the tax, and prohibitive penalties followed failure to comply with the statutes and to make the specified payments. Baltic Mining Co. v. Commonwealth, 207 Mass. at 388. Since the several states under the Constitution of the United States have no right to impose restrictions or regulations upon interstate commerce, it was held that these tax statutes did not apply to corporations [fol. 44] engaged solely in interstate commerce at a place of business within the Commonwealth. Marconi Wireless Telegraph Co. v. Commonwealth, 218 Mass. 558, 561, 563-565, 567-569 and cases there collected. Old Dominion Co. v. Commonwealth, 237 Mass. 269.

The present tax act imposes the excise with respect to the carrying on of business by foreign corporations within the Commonwealth. It is an excise for the privilege of having a place of business under the protection of our laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done here by a foreign corporation. The excise is measured by two factors, (1) the value of the corporate excess employed within the Commonwealth, and (2) the net income derived from business within the Commonwealth.

1. The value of the corporate excess employed in the Commonwealth as a factor of the tax is not measured by the capital stock of the corporation. If it were, it would be invalid. International Paper Co. v. Massachusetts, 246 U. S. 135. It is measured by the value of the property of the foreign corporation, including its franchise, employed in the Commonwealth, after certain deductions are made. It seems to us that this factor of the tax stands under the protection of several decisions of the Supreme Court of the United States.

The right of a state to tax tangible property of a foreign corporation, not in transit but located within its borders, no matter what may be its use, is well settled. The petitioner has a small amount of tangible personal property permanently within the Commonwealth, upon which it pays no tax except by way of this factor of [fol. 45] the excise.

The petitioner exercises within the Commonwealth its franchise to do business as a corporation. It did whatever was necessary to conduct a business yielding according to its return annual gross receipts assignable to Massachusetts of $424,982.70. The facts in Western Union Telegraph Co. v. Massachusetts, 125 U. S. 530, were that an excise was levied upon a telegraph company exercising a franchise in many states by virtue of laws of the United States and having poles and wires in this Commonwealth. If there was said that the state law attempted "to ascertain the just amount which

any corporation engaged in business within its limits shall pay as a contribution to the support of its government upon the amount and value of the capital so employed by it therein. * * * The tax * * * is in effect a tax * * * on account of property owned and used * * * in the State of Massachusetts." It was said in Pullman's Car Co. v. Pennsylvania, 141 U. S. 18, a case involving the taxation of cars used in interstate commerce, at 25, "The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation; * * * The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not." See also Pullman Co. v. Richardson, decided March 12, 1923, 260 U. S. —. In Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, at 163, occur these words: "The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, providing at least the franchise is not derived from the United States." In United States Express Co. v. Minnesota, [fol. 46] 223 U. S. 335, at 345, it was said, "The State must be allowed to tax the property and to tax it at its actual value as a going concern. On the other hand the State cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt to or effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account."

It is manifest as matter of common business knowledge that commerce within this Commonwealth yielding to the petitioner annual gross receipts of $424,982.70 must have involved credits, bills receivable and obligations to it of considerable amounts. No contention to the contrary has been urged by the petitioner. Such credits, bills receivable and obligations might be made subject to direct taxation within the Commonwealth by appropriate legislation under numerous decisions of the United States Supreme Court. Such credits, bills receivable and obligations constitute a part of "the value of the assets" of the petitioner "employed in * * * [its] business within the Commonwealth" used as the basis of ascertaining "the corporate excess" of the petitioner "employed within the Commonwealth" upon which this factor of the excise is calculated.

This branch of the case seems to us to come within the scope of these words in Shaffer v. Carter, 252 U. S. 37, at 52: "This is consonant with numerous decisions of this court sustaining state taxation of credits due to non-residents. New Orleans v. Stempel, [fol. 47] 175 U. S. 309, 320 et seq.; Bristol v. Washington County, 177 U. S. 133, 145; Liverpool &c. Ins. Co. v. Orleans Assessors, 221 U. S. 346, 354; and sustaining federal taxation of the income of an alien non-resident derived from securities held in this country. De Ganay v. Lederer, 250 U. S. 376." Blackstone v. Miller, 188 U. S. 189, 205, 206.

It appears to us that under the principle deducible from all these decisions the tax, so far as it relates to the value of corporate excess of the petitioner, rightly may be levied.

2. The tax, as measured by the net income from business transacted in Massachusetts as a factor, is dependent upon net profits derived solely from interstate commerce. But there is no discrimination in the statute against interstate commerce. This net income is used as a measure applicable to all corporations alike. While not an income tax according to strict definition, in substance it affects net income alone, is measured by net income alone, is reasonable in amount and incidence, and is payable out of net income.

It was settled by Travis v. Yale & Towne Mfg. Co. 252 U. S. 60, that the income of non-residents was subject to taxation within the state where earned or accruing. That result was reached on the ground that, except in the particular restrictions imposed by the Federal Constitution, the states have complete dominion over persons, business and property within their borders, are charged with the duty of maintaining order and establishing security for such persons, business and property, and consequently may resort to any proper form of taxation of those deriving benefits from their protection in [fol. 48] order to defray expenses of government. In Peck & Co. v. Lowe, 247 U. S. 165, question arose as to the right of Congress, in view of the constitutional prohibition against laying a "tax or duty" "on articles exported from any state," to tax net income derived by a domestic corporation chiefly from shipping goods to foreign countries and there selling them. It was said, p. 174, "The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exeportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax * * *, it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a disc-iminative way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely." In Shaffer v. Carter, 252 U. S. 37, a state statute taxing a non-resident for income derived from property and business within the state, was assailed. It was said at page 57, "It is urged that, regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. v. Pennsylvania, 245 U. S. 292, but only upon the net proceeds, and is plainly sus-[fol. 49] tainable even if it includes net gains from interstate commerce. U. S. Glue Co. v. Oak Creek, 247 U. S. 321. Compare Peck & Co. v. Lowe, 247 U. S. 165." In United States Glue Co. v. Oak Creek, 247 U. S. 321, the distinction was pointed out between an

invalid tax based on gross revenue and a valid tax based on net profits. It was said at pp. 328 329, "The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In Crew Levick Co. v. Pennsylvania, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to S. S. 8 and 10 of Article 1 of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in Peck & Co. v. Lowe, ante, 165, we held that the Income Tax Act of October 3, 1913, c. 16, s. 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. 1, s. 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of dis-
[fol. 50] c-imination, but just as it was laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden. The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or so to diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States." In Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113 at 119 it was said, "Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate busi-
[fol. 51] ness. Its enforcement is left to the ordinary means of

collecting taxes. St. Louis Southwestern Ry. Co. v. Arkansas, 235 U. S. 350, 364; Atlantic & Pacific Telegraph Co. v. Philadelphia, 190 U. S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon properly used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled. United States Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer v. Carter, 252 U. S. 37, 57." Hump Hairpin Co. v. Emmerson, 258 U. S. 290, 294. Attorney General v. Bay State Mining Co., 99 Mass. 148.

It seems to us that the constitutionality of the statute in the particulars here assailed is sustained by the decisions of the United States Supreme Court already cited and from some of which quotations have been made. The principles there declared, as we understand them, support the validity of the tax act here involved. In reaching that conclusion we are not unmindful of all that has been said and decided in Western Union Telegraph Co. v. Kansas, 216 U. S. 1; Looney v. Crane Co. 245 U. S. 135; Meyer v. Wells Fargo & Co. 223 U. S. 298; International Paper Co. v. Massachusetts, 246 U. S. 135; Wallace v. Hines, 253 U. S. 66; Gillespie v. Oklahoma, 257 U. S. 501. The case at bar appears to us to be governed by the other line of decisions. See 32 Harvard Law Review, 634-640, 646-649 and cases there collected and reviewed. Superior v. Allouez Bay [fol. 52] Dock Co. 10 166 Wis. 76, 80. The principle that the states can impose no direct burden upon interstate commerce, illustrated by cases like McCall v. California, 136 U. S. 104; Norfolk & Western Railroad v. Pennsylvania, 136 U. S. 114; International Text Book Co. v. Pigg, 217 U. S. 91; Crenshaw v. Arkansas, 227 U. S. 389, and Rogers v. Arkansas, 227 U. S. 401, appear to us to be inapplicable to the case at bar in that they related to statutes which imposed that which in essence was a license fee as a condition prerequisite to doing interstate commerce.

The tax considered as a whole with both its main factors is general in nature and reasonable in amount. The tax upon the petitioner in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth, and upon the exercise of its franchise within this Commonwealth, and, so far as concerns the factor of its income, upon the net income derived from business in this Commonwealth, after all losses and expenses have been paid. It is not directed against interstate commerce or property outside the state but is confined to business done, property located, capital employed and net income earned within the Commonwealth. It affects interstate commerce indirectly and is not an immediate burden upon it. It affords to the state only a fair

and reasonable revenue for the maintenance of the government of the protection of which the petitioner enjoys the benefits. Our conclusion is that the law thus construed, as applying to a foreign corporation using a part of its property exclusively for interstate com- [fol. 53] merce within the Commonwealth, violates no guaranty established by the Constitution of the United States. The tax statute, therefore, is interpreted as applying to a corporation engaged in business within the Commonwealth as is the petitioner.

It is doubtful whether the remaining point argued by the petitioner is open under the last paragraph of the agreed facts, viz., "The amount of the tax assessed is not questioned, but may be referred to as bearing on the questions of law presented. No question of valuation is involved." This appears to preclude inquiry now into the details of the computation or the methods of calculation, and to leave open only questions whether the statute on its face, according to its correct interpretation, is unconstitutional in its application to the facts under which the petitioner does business.

But if the matter be treated on its merits, the contention of the petitioner that its property outside the Commonwealth has been included in the tax and hence that it has been deprived of its property without due process of law, contrary to the Fourteenth Amendment to the United States Constitution, seems to us without substantial merit. This contention is founded on the method of allocation adopted by the commissioner. In the case of a foreign corporation not transacting its entire business within the Commonwealth, the tax is based, so far as concerns the proportion of net income allocated to this Commonwealth on (1) precentage of tangible assets in Massachusetts to all tangible assets, (2) percentage of wages assignable to Massachusetts to total wages, and (3) percentage of gross receipts assignable to Massachusetts to gross receipts from all its business. There is in this problem no reference to stocks, bonds [fol. 54] or intangible securities, except bonds, notes and certificates of indebtedness of the United States. Such assets do not enter into the calculation or allocation. It seems to us that the question in this connection is not whether a subsidiary percentage standing alone may impinge upon property outside the Commonwealth, but whether the use of all the percentages makes the final result a tax which violates constitutional guarantees. The several percentages are not taxes levied upon the terms employed. They are used in combination to ascertain a sum which in amount as applied to all corporations may be reasonable. The tax so far as concerns this factor is measured upon net income alone and is only payable out of net income. Excises may be measured to some extent by property not subject to direct taxation. Commonwealth v. Hamilton Mfg. Co. 12 Allen, 298, 306, 307. Hamilton Mfg. Co. v. Massachusetts, 6 Wall. 632, 639, 640. Flint v. Stone Tracy Co. 220 U. S. 107, 165. The aim of the statute in this particular is to reach only profits earned within the State. The total net income for the year was $1.148,041.70, of which $15.370.06 was allocated to Massachusetts. The gross receipts assignable to Massachusetts, according to the petitioner's return, were $424,982.70, out of a total of $12,774,

$25.05. The facts do not appear to us to show that the proportion of net income ultimately allocated to this Commonwealth was in excess of the just amount. We think that the case in this respect is within the authority of Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113. Our statute in its phrase is different from that under consideration in People ex rel. Alpha Portland Cement Co. v. Knapp, 230 N. Y. 48, 231 N. Y. 516.

The same reasoning applies to the suggestion that the tax is invalid because wages paid in connection with the Massachusetts office [fol. 55] included in part services rendered by traveling salesmen going to other states as well as Massachusetts.

Petition dismissed with costs.

[fol. 56] APPENDIX

G. L., c. 63

Section 30. When used in this section and sections thirty-one to fifty-two inclusive, the following terms shall have the following meanings:

1. "Domestic business corporation," every corporation organized under or subject to chapter one hundred and fifty-six.

2. "Foreign corporation," every corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter one hundred and fifty-six, which has a usual place of business in this commonwealth, or is engaged here, permanently or temporarily, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind.

3. "Corporate excess," in the case of a domestic business corporation, the fair cash value of all the shares constituting the capital stock of a corporation on the first day of April when the return called for by section thirty-five is due, less the value of the following:

(a) The works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee.

(b) Securities, the income of which, if any, if received by a natural person resident in this commonwealth, would not be liable to taxation, except shares in national banks and voluntary associations, trusts and partnerships.

[fol. 57] (c) Its real estate, machinery, merchandise and other tangible property situated in another state or country, except such part thereof as represents the interest of a mortgagee.

(d) If any portion of its cash and accounts and bills receivable, excluding notes, is attributable to an office outside of the commonwealth, the same proportion of its cash and accounts and bills receivable, excluding notes, which its real estate, machinery and merchandise situated in another state or country bear to its total real estate, machinery and merchandise, to the extent that such proportion fairly represents, in the judgment of the commissioner, the amount which is properly allocable to such other state or country.

4. "Corporate excess employed within the commonwealth" by a foreign corporation, such proportion of the fair value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following:

(a) Works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee;

(b) Securities held in the commonwealth, the income of which, if any, if received by a natural person resident therein, would not [fol. 58] be liable to taxation, except shares in national banks, voluntary associations, trusts and partnerships. In determining the proportion of assets employed within the commonwealth, the commissioner may include such bank deposits in other states as are employed, principally in the conduct of the business in the commonwealth.

5. "Net income," except as otherwise provided in sections thirty-four and thirty-nine, the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act of nineteen hundred and eighteen, and, in the case of a domestic business corporation, such interest and dividends, not so required to be returned as net income, as would be taxable if received by an inhabitant of this commonwealth; less, both in the case of a domestic business corporation and of a foreign corporation, interest, so required to be returned, which is received upon bonds, notes and certificates of indebtness of the United States.

6. "Taxable year," the fiscal or calendar year for which the corporation was required to make its last return to the federal government due prior to April first of the year in which the tax is to be assessed, or, if such return was for a fractional period, a full year, including and ending with such fractional period.

Section 31. In determining the corporate excess of a domestic business corporation, or the corporate excess employed within the commonwealth by a foreign corporation, there shall not be deducted the value of shares in national banks and in voluntary associations, [fol. 59] trusts and partnerships, nor of other securities the income

of which, if owned by a natural person resident in this commonwealth, would be liable to taxation, nor shall there be deducted the value of any shares of stock of the corporation itself owned directly or indirectly by it or for its benefit; and the commissioner, in determining for the purposes of taxation the value of the corporate excess of, or corporate excess employed within the commonwealth by, any such corporation, shall not take into consideration any debts of the corporation unless he is satisfied that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it, and, in the case of a domestic business corporation which is a subsidiary of a foreign corporation or closely affiliated therewith by stock ownership, that such debts represent only the fair value of the property given therefor.

Section 32. Except as otherwise provided in sections thirty-three and thirty-four, every domestic business corporation shall pay annually, with respect to the carrying on or doing of business by it, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of the fair cash value of all the shares constituting its capital stock on the first day of April when the return called for by section thirty-five is due:

(1) An amount equal to five dollars per thousand upon the value of its corporate excess.

(2) An amount equal to two and one half per cent of that part of its net income, as defined in this chapter, which is derived from business carried on within the commonwealth.

[fol. 60] Section 33. If a domestic business corporation which is a subsidiary of a foreign corporation or closely affiliated therewith by stock ownership, is so managed that its books of account do not show its true earnings, it shall pay as a minimum tax under this chapter an amount equal to twenty dollars per thousand on its corporate excess, unless it shall file within the first ten days of April a statement, as of April first, of its net income showing to the satisfaction of the commissioner its true earnings for its last prior fiscal year, eliminating therefrom all payments to such other corporation or its officers in excess of the fair value of the property or services given therefor.

Section 34. If two or more domestic business corporations participated in the filing of a consolidated return of income to the Federal government, the tax under paragraph (2) of section thirty-two may, at their option, be assessed upon their combined net income, which tax shall be assessed to all said corporations and collected from any one or more of them. In the case of domestic business corporations thus affiliated and not electing, under the foregoing provision, to be assessed upon their combined net income, and in the further case of one or more domestic business corporations filing with one or more foreign corporations a consolidated return of net income to the Fed-

eral government, each such domestic business corporation shall file with the commissioner, as a part of its return required by this chapter, a statement of net income in such form as he may prescribe, showing its gross income and deductions in accordance with the law [fol. 61] and regulations governing the usual Federal returns of corporations not thus affiliated, and the net income thus shown, after making deductions therefrom and additions thereto as provided in paragraph five of section thirty, shall be the "net income" under this chapter.

Section 35. Every domestic business corporation shall, within the first ten days of April, make a return as of April first, sworn to by its treasurer or assistant treasurer, or in their absence or incapacity by any other principal officer, in such form as the commissioner prescribes, giving (a) a copy of such parts as he may designate of the Federal return or returns for the year on the income of which the tax is to be assessed, which it has made singly or with one or more other corporations, (b) such other data as he requires to determine the proportion of net income derived from business carried on within the commonwealth, (c) such information as he requires for the determination of the corporate excess. Whenever the time for filing its Federal return has been extended, the commissioner may extend the time for filing such return.

Section 36. If the assessment made by the Federal government is based upon a net income greater or less than the net income returned by said corporation, or if an additional assessment is at any time made on the ground that the net income was incorrectly returned in the first instance, or if, after the tax as assessed is paid to the Federal government, any part of such tax is refunded, the corporation, within ten days after the receipt of such notice of said fact, shall make return on oath to the commissioner of the amount by which the net income originally returned differs from the net income on which the tax was computed by the Federal government [fol. 62] upon the latest determination by it of the proper tax, and of the facts giving rise to the difference. If upon such facts an additional tax is due the commonwealth, the commissioner shall assess the additional tax, and the corporation shall, within thirty days after receipt of notice from the commissioner of the amount thereof, pay such additional tax. If upon said facts a less tax is due the commonwealth than that paid by the corporation, the State treasurer shall, upon certification of the commissioner, repay within thirty days such difference without any further statutory appropriation therefor.

Section 37. The commissioner shall determine, in the manner provided in this and the following section, the part of the net income of a domestic corporation derived from business carried on within the commonwealth. The following classes of income shall be allocated as follows:

(a) Interest and dividends which would be taxable under section one of chapter sixty-two, if received by an inhabitant of the commonwealth, shall be allocated to this commonwealth.

(b) Gains realized from the sale of capital assets, if such assets consist of intangible property or if they consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(c) Gains received from the sale of capital assets, if such assets consist of real estate or tangible personal property situated outside the commonwealth, shall not be allocated in any part to this commonwealth.

[fol. 63] Section 38. Income of the classes described in the preceding section having been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

1. If the corporation carries on no business outside the commonwealth, the whole of said remainder shall be allocated to this commonwealth.

2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

(a) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

(b) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employees.

(c) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount [fol. 64] of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of

the three rules is applicable, the part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the trans- [fol. 65] action of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (b) rentals or royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation.

7. If a corporation maintains an office, warehouse or other place of business in a State other than this commonwealth for the purpose of reducing its tax under this chapter, the commissioner shall, in determining the amount of its gross receipts from business assignable to this commonwealth, include therein the gross receipts from sales attributed by the corporation to the business conducted at such place of business in another State.

8. In the case of consolidated returns of net income, the commissioner shall allocate such income, so far as practicable, in accordance with the above rules.

9. A rule shall not be deemed to be inapplicable merely because all the tangible property of the expenditure of a corporation for wages, salaries commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth.

[fol. 66] 10. From the net income allocated to this commonwealth there shall be deducted the same proportion thereof which the fair

cash value of machinery owned by the corporation and used in manufacturing in the commonwealth bears to its total assets employed therein, and the amount remaining shall be its net income subject to tax under this chapter.

Section 39. Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of such proportion of the fair cash value of all the shares constituting its capital stock as the assets, both real and personal, employed in any business within the commonwealth on April first following the close of the taxable year, bear to the total assets of the corporation employed in business on said date:

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth.

If two or more foreign corporations doing business in this commonwealth participated in the filing of a consolidated return of income [fol. 67] to the federal government, the tax under paragraph (2) above may, at their option, be assessed upon their combined net income, in which case the tax shall be assessed to all said corporations and collected from any one or more of them. Foreign corporations thus affiliated and doing business in this commonwealth, which do not elect, under the foregoing provision, to be assessed upon their combined net income and all other foreign corporations doing business in this commonwealth, which have filed with one or more corporations not subject to this section a consolidated return of net income to the federal government, shall each file with the commissioner, as a part of the return required by this chapter, a statement of net income in such form as he may prescribe, showing the gross income and deductions in accordance with the law and regulations governing the usual federal returns of corporations not thus affiliated; and the net income thus shown, after making deductions therefrom and additions thereto as provided in paragraph five of section thirty, shall be the "net income" under this chapter.

Section 40. Every foreign corporation shall make returns as provided in sections thirty-five and thirty-six; and all provisions of said sections shall apply to such corporations, except that the term "corporate excess" in said section thirty-five shall, in the case of a foreign corporation mean the corporate excess employed by it within the commonwealth.

Section 41. The commissioner shall determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

The following classes of income shall be allocated as follows:

(a) Gains realized from the sale of capital assets, if such [fol. 68] assets consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(b) Interest received from any corporation organized under the laws of the commonwealth or from any association, partnership or trust having transferable shares and having its principal place of business in the commonwealth, or from any inhabitant of the commonwealth, except interest received on deposits in trust companies or in national banks doing business in the commonwealth, shall be allocated to this commonwealth.

(c) Gains realized from the sale of capital assets other than those named in paragraph (a) above shall not be allocated in any part to this commonwealth.

Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight.

Section 42. A foreign corporation carrying on part of its business outside the commonwealth may, in lieu of the allocating method required by the preceding section for determining the amount of business assignable to this commonwealth, refuse to accept such determination by notification thereof to the commissioner on or before the time when its income tax return under this chapter is due to [fol. 69] be filed. Such a foreign corporation shall, within thirty days thereafter, file with the commissioner, under oath of its treasurer, a statement in such detail as the commissioner shall require, showing the amount of its annual net income derived from business carried on within the commonwealth. The commissioner may require such further information with reference thereto as he may deem necessary for the assessment of the tax, and shall determine the proportion of the net income received from business carried on within the commonwealth.

Section 43. After determining the amount of tax due from any foreign corporation under paragraph (2) of section thirty-nine, the commissioner shall then credit the corporation with a sum equal to five per cent of the dividends paid by it, during the previous calendar year, to inhabitants of this commonwealth, and the amount then remaining due shall be the amount of tax to be levied upon the corporation under said paragraph; provided, that if more than one half of the capital stock of any such corporation is owned by another foreign corporation not subject to taxation under sections

thirty to fifty-one, inclusive, but has stockholders who are inhabitants of this commonwealth and are subject to taxation upon their income under section one of chapter sixty-two, such corporation, upon filing with the commissioner such information as he shall deem necessary for the purpose, shall be credited with a sum equal to five per cent of such a proportion of its total dividends as will prevent double taxation of the income of the corporation and of the dividends of such other foreign corporation actually taxed to inhabitants of this commonwealth.

* * * * * * *

[fol. 70] Section 52. If the excise imposed by section thirty-two on domestic business corporations, or that imposed by section thirty-nine on foreign corporations, is declared unconstitutional by a final judgment, order or decree of the United States Supreme Court or the supreme judicial court of the commonwealth, sections thirty to fifty-one, inclusive, shall be null and void, and all laws repealed or made inoperative by chapter three hundred and fifty-five of the General Acts of nineteen hundred and nineteen shall thereupon be revived and continue in full force and effect as if the said chapter had not been enacted. In such case the commissioner and local assessors shall forthwith assess all taxes that have become due under such prior laws, and the time for making any assessment or performing any other duty imposed or privilege granted by such laws shall be extended for a period of six months after the date when they are thus determined to be in force, and the time within which corporations may apply by petition to the Supreme Judicial Court under section seventy-seven for the abatement of the excise imposed by section thirty-two, or of that imposed by section thirty-nine, shall be extended for the same period. If any part, section or sub-division of said sections, thirty to fifty-one, inclusive, other than the provisions in sections thirty-two and thirty-nine imposing an excise, shall be declared unconstitutional, the validity of the remaining parts of said sections thirty to fifty-one, inclusive, shall not be affected thereby.

[fol. 71] St. 1921, c. 361

Section 1. The tax assessed in the year nineteen hundred and twenty-one accordance with the provisions of section thirty-two of chapter sixty-three of the General Laws and tax assessed against any foreign corporation in accordance with the provisions of section thirty-nine of said chapter sixty-three shall be not less than an amount equal to one twentieth of one per cent of the said corporation's gross receipts from business assignable to this commonwealth as defined in clause six of section thirty-eight of said chapter sixty-three.

Section 2. All provisions of chapters fifty-eight and sixty-three of the General Laws relative to assessment, collection, payment, abatement, penalties, distribution and administration shall, so far as pertinent, be applicable to taxes under this act.

St. 1921, c. 493

Section 1. Every corporation subject to the provisions of sections thirty to sixty, inclusive, of chapter sixty-three of the General Laws, shall pay, in addition to all other taxes, an excise tax at the rate of three quarters of one per cent of its net income as herein defined and apportioned to this commonwealth. "Net income" shall mean the net income of said corporations for the period covered by their return of income to the federal government due next prior to April first, nineteen hundred and twenty-one, subject to the provisions of the following sections.

* * * * * * *

Section 5. The proportion of the net income taxable under this act in cases of corporations carrying on business outside of this [fol. 72 & 73] Commonwealth shall be as follows:—In the case of a corporation deriving profits principally from the ownership, sale or rental of real estate, and in case of a corporation deriving profits principally from the sale or use of tangible personal property owned by it, such proportion as the fair cash value of its real estate and tangible personal property in this commonwealth on April first of the current year is to the fair cash value of the entire real estate and tangible personal property owned by it on that date with no deduction on account of any encumbrance thereon.

In the case of a corporation deriving profits principally from the holding or sale of intangible property such proportion as its gross receipts assignable to this commonwealth for the year covered by its return is to its gross receipts for such year within and without the commonwealth.

In case neither of the above methods is applicable, the commissioner of corporations and taxation shall determine, in such manner as he deems equitable, the proportion of the net income received from business carried on within this commonwealth.

The apportionment of net income to this commonwealth as provided in this section shall apply to all corporations, domestic or foreign, which are taxable under this act.

[fol. 74] [File endorsement omitted.]

[fol. 75] Commonwealth of Massachusetts,
Suffolk, ss:

Supreme Judicial Court

In Equity. #35433.

[Title omitted]

Petition for Writ of Error—Filed June 7, 1923

Now comes the Alpha Portland Cement Company and says that on the 22nd day of May 1923 the Supreme Judicial Court within the

County of Suffolk in the Commonwealth of Massachusetts entered final judgement herein in favor of the above named respondent and against the above named petitioner, in which judgment and the proceedings had prior thereto in said cause certain errors were committed to the prejudice of the above named petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore the undersigned corporation, being the petitioner aforesaid, prays that a writ of error may issue in this behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected and the said judgment reversed and that a transcript of the record, proceedings and papers in this suit duly authenticated may be sent to the Supreme Court of the United
[fol. 76] States.

Alpha Portland Cement Company, By Louis H. Porter, F. Carroll Taylor, John G. Palfrey, Its Solicitors.

[fol. 77] [File endorsement omitted.]

[fol. 78] IN SUPREME JUDICIAL COURT

ORDER ALLOWING WRIT OF ERROR

Writ of error allowed upon the execution of a bond by the above named petitioner as principal, and the New Amsterdam Casualty Co. of Maryland, as surety in the sum of Five Hundred Dollars $500.

June 5, 1923.

Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

[fol. 79] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

In Equity. #35433.

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 7, 1923

Now comes Alpha Portland Cement Company, the petitioner in the above entitled cause, being the plaintiff in error herein, and with its petition for a writ of error makes and files the following assignment of errors, and says that there is manifest error in the records and proceedings in the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

1. The court erred in holding that the provision of the Massachusetts Excise Tax on foreign corporations as contained in Chapter

63 of the General Laws of the Commonwealth of Massachusetts and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Acts of 1921, as applied to the plaintiff in error, were constitutional and not in violation of the provisions of the "commerce clause" contained in Section 8, Article I of the Constitution of the United States, as placing a burden or [fol.80] tax on interstate commerce equivalent to the regulation thereof; and

II. The court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations as contained in Chapter 63 of the General Laws of the commonwealth of Massachusetts and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Acts of 1921, as applied to the plaintiff in error are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law in that said statute imposes a tax on income of the business and sales made outside of the said Commonwealth, and upon property located without said Commonwealth.

For which errors the said plaintiff in error, Alpha Portland Cement Company, prays that the judgment of the said Supreme Judicial Court for the Commonwealth of Massachusetts be reversed and judgment entered for the plaintiff in error, and for costs.

Alpha Portland Cement Company, By Louis H. Porter, F. Carroll Taylor, John G. Palfrey, Its Solicitors

[fol. 81] [File endoresment omitted.]

[fol. 82–84] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

IN EQUITY. #—.

[Title omitted.]

BOND ON WRIT OF ERROR [FOR $500.00; APPROVED, RUGG, C. J., AND OMITTED IN PRINTING.]

85 CITATION AND SERVICE

UNITED STATES OF AMERICA, ss:

The President of the United States to Commonwealth of Massachusetts, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington in the District of Columbia, *thirty days after date of this action, pur-

*Not exceeding 30 days from the day of signing.

suant to a Writ of Error filed in the Clerk's Office of the †Supreme Judicial Court of the Commonwealth of Massachusetts within and for the County of Suffolk, wherein Alpha Portland Cement Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of Massachusetts this fifth day of June, in the year of our Lord one thousand nine hundred and twenty-three. Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

[fol. 86] UNITED STATES OF AMERICA,
District of Massachusetts, ss:

Boston, June 5, 1923.

Due and sufficient service of the within citation is hereby accepted in behalf of the Commonwealth of Massachusetts.

Alexander Lincoln, Assistant Attorney General.

[fol. 87] COMMONWEALTH OF MASSACHUSETTS,
Suffolk, ss:

SUPREME JUDICIAL COURT

CLERK'S CERTIFICATE

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereunto annexed are an exemplification of the record in the case of Alpha Portland Cement Company, Petitioner, vs. Commonwealth of Massachusetts, Respondent, in said Supreme Judicial Court determined; and attached thereto, and transmitted with said record, are a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the Application for Writ of Error; a copy of the Assignment of Error; a copy of the Bond; and the original Citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this twelfth day of June in the year of our Lord one thousand nine hundred and twenty-three.

John F. Cronin, Clerk. [SEAL.]

Endorsement on cover: File No. 29,712. Massachusetts Supreme Judicial Court. Term No. 402. Alpha Portland Cement Company, plaintiff in error, vs. Commonwealth of Massachusetts. Filed June 29th, 1923. File No. 29,712.

†Name of Court to which Writ of Error is directed.

(30,198)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 327

ALPHA PORTLAND CEMENT COMPANY, PLAINTIFF IN ERROR,

vs.

COMMONWEALTH OF MASSACHUSETTS

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 26, 1924

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[fol. a] **IN SUPREME JUDICIAL COURT OF MASSACHUSETTS**

JUDGE'S CERTIFICATE TO CLERK

I, Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts, do certify that John F. Cronin, Esquire, whose signature is affixed to the paper hereto annexed, is Clerk of said Court, holden at Boston, in and for the County of Suffolk, in said Commonwealth, and hath the keeping of all the ancient files, records, and proceedings of said Court throughout the Commonwealth, down to the first day of August A. D. 1797, as well as of the files, records, and proceedings of said Court holden as aforesaid, for said County of Suffolk, subsequent to that time; and is, by law, the proper person to make out and to certify copies of all the records and proceedings of the said Supreme Judicial Court previous to the said first day of August A. D. 1797, as well as of all records and proceedings of the said Court, holden as aforesaid, for the said County of Suffolk, subsequent to that time; and that full faith and credit is and ought to be given to his acts and attestations, done as aforesaid, and that his attestation to the paper hereunto annexed is in due form.

In testimony whereof, I have here unto set my hand, and caused the seal of said Court to be hereunto affixed, this fourteenth day of March in the year one thousand nine hundred and twenty-four.

Arthur P. Rugg. (Seal.)

[fol. 1] UNITED STATES OF AMERICA, ss:

IN SUPREME JUDICIAL COURT OF MASSACHUSETTS

WRIT OF ERROR AND RETURN—Filed March 12, 1924

[Seal of the United States District Court, Massachusetts.]

The President of the United States to the Honorable the Justices of the Supreme Judicial Court of the Commonwealth of Massachusetts, holden at Boston, within and for the County of Suffolk, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Judicial Court before you, or some of you, being the highest court of law or equity of the Commonwealth of Massachusetts in which a decision could be had in the said suit between Alpha Portland Cement Company, a corporation duly organized and existing under the laws of the State of New Jersey, Plaintiff, and Commonwealth of Massachu-

setts, Defendant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Alpha Portland Cement Company,
as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the twelfth day of March, in the year of our Lord one thousand nine hundred and twenty-four.

James S. Allen, Clerk of the District Court of the United States, District of Massachusetts.

March 12, 1924.

Allowed by Arthur P. Rugg, Chief Justice of the Supreme Judicial Court of the Commonwealth of Massachusetts.

[fol. 2] COMMONWEALTH OF MASSACHUSETTS, ss:

And now here the Judges of the Supreme Judicial Court make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Judicial Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John F. Cronin, Clerk of said Supreme Judicial Court, have hereto set my hand and the seal of said court this fourteenth day of March, A. D. 1924.

John F. Cronin, Clerk. (Seal.)

[File endorsement omitted.]

[fol. 3] SUFFOLK, ss:

IN SUPREME JUDICIAL COURT

In Equity

ALPHA PORTLAND CEMENT COMPANY

vs.

COMMONWEALTH OF MASSACHUSETTS

PETITION

To the Honorable the Justices of the Supreme Judicial Court of Massachusetts, sitting in equity, within and for the County of Suffolk:

Respectfully represents your petitioner, Alpha Cement Company, as follows:

1. Your petitioner is a foreign corporation organized and existing under and by virtue of the Laws of the State of New Jersey, and is and was at all the times hereinafter mentioned engaged extensively in interstate commerce throughout the United States, and maintains in the City of Boston, County of Suffolk, in the Commonwealth of Massachusetts, a sales office used exclusively for conducting interstate commerce, and for no other purpose.

2. The activities of your petitioner within the Commonwealth of Massachusetts are exclusively confined to the solicitation by salesmen engaged by petitioner of orders from customers resident therein and neighboring states, and the transmission of the said orders by mail to the home office of your petitioner, located in the City of [fol. 4] Easton, in the Commonwealth of Pennsylvania, where the said orders are accepted or rejected. Your petitioner entered the Commonwealth of Massachusetts for the sole purpose of transacting interstate commerce, and has always strictly confined its operations within the said Commonwealth of Massachusetts to the solicitation of orders as aforesaid, and to the execution of said orders when they have been accepted, which acceptance takes place outside of the Commonwealth of Massachusetts as aforesaid, and the shipment of merchandise called for thereby from other states, where goods sold are manufactured, produced or stored by your petitioner, into the

Commonwealth of Massachusetts or neighboring states, where the purchaser resides, the said point of delivery in every case, however, being different from the state where such transportation begins.

3. The business of your petitioner consists of the manufacture and sale of cement. The sales office maintained by your petitioner within the Commonwealth of Massachusetts is in charge of a District Sales Manager, who himself solicits orders at the places of business of prospective customers, the only other employee in the said office being a clerk. In addition to the District Sales Manager your petitioner employes three salesmen who solicit orders in the Commonwealth of Massachusetts and in other states of New England, for cement packed in sacks, bags or barrels. The orders taken by said salesmen are turned in at said sales office and forwarded to the home office of your petitioner at Easton, Pa., where they are accepted or rejected. If the said orders are accepted the merchandise is shipped from the Company's mills located at Martins Creek, Pa. or Alsen, N. Y. direct to the consumer. Invoices for merchandise so shipped are sent from the principal office at Easton, Pa. direct to the consumer, and contain a direction that funds in payment therefor be sent direct to your petitioner's home office at Easton, Pa. In substantially all cases, funds in payment of said merchandise are sent directly by the customer to the said home office of your petitioner at Easton, Pa., a very large majority of the payments being discounted and paid within ten days. Your petitioner keeps no merchandise in its sales office located in the City of Boston, or anywhere in Massachusetts, in sample form or otherwise. Your petitioner keeps no bank account in Massachusetts, the office rent and salesmen's salaries being paid direct from your petitioner's office at Easton, Pa. Incidental expenses are paid from an impress account of not exceeding one thousand ($1,000.00) kept by your petitioner's District Sales Man-
[fol. 5] ager in his own name. Your petitioner keeps no books of record in Massachusetts, nor is any of your petitioner's property located in Massachusetts, other than a few hundred dollars' worth of office furniture located in the said office. Your petitioner ships no merchandise from one point in Massachusetts to another point in that state, nor from the Commonwealth of Massachusetts to any other state or country. None of your petitioner's stockholders' or directors' meetings are held in Massachusetts, and no officer or agent of your petitioner has any office in Massachusetts except the District Sales Manager mentioned.

4. Your petitioner has on several occasions advised the Department of Corporations and Taxation of the Commonwealth of Massachusetts of the details of its activities carried on within the said Commonwealth of Massachusetts, and has steadily and repeatedly claimed that its said activities were purely interstate in character, and that your petitioner could not legally be required to pay any excise or tax to the Commonwealth of Massachusetts. Notwithstanding such information so supplied to the Department of Corporations and Taxation, and your petitioner's contention in respect thereto, the Com-

missioner of Corporations and Taxation of the Commonwealth of Massachusetts decided that your petitioner was subject to the Excise Tax Law of the Commonwealth of Massachusetts, and demanded that your petitioner prepare and file a return, as provided by the Foreign Corporations Excise Tax Act of the Commonwealth of Massachusetts, and that upon your petitioner's failure to do so, severe penalties would be assessed against it. That in compliance with the said demand and not as its voluntary act, your petitioner on the 6th day of May, 1922 made and delivered under protest to the Department of Corporations and Taxation of the Commonwealth of Massachusetts, a report in writing for the year 1922 in the form prescribed by the said Commissioner of Corporations and Taxation, for the purpose of supplying the said Commissioner with the information demanded by him for the purpose of assessing the excise tax claimed by the said Commissioner to be due under the provisions of Chapter 63 of the General Laws as amended. A copy of said return and of the protest accompanying the same is hereunto annexed and marked Exhibit "A."

5. That thereafter and on or about the 20th day of September, 1922, the said Department of Corporations and Taxation of the Commonwealth of Massachusetts, made and settled an account against [fol. 6] your petitioner for taxes based upon the information contained in said return, Exhibit A hereto annexed, and claimed to be due from your petitioner for the year 1922, under the provisions of Chapter 63 of the General Laws and acts of amendment thereof and in addition thereto, and in accordance with Chapters 361 and 493 of the Acts of 1921, for the sum of five hundred sixty-seven & 57/100 ($567.57) dollars, and rendered such account and notice thereof to your petitioner; a copy of said account is hereunto annexed and marked Exhibit "B."

6. Thereafter and on the 26th day of September, 1922, in a letter to your petitioner's attorneys, Messrs. Porter & Taylor, the said Department of Corporations and Taxation of the Commonwealth of Massachusetts stated the basis upon which the said assessment had been made. A copy of said letter is hereunto annexed and marked Exhibit "C."

7. That in computing the amount of said tax measured by $5.00 a thousand upon the value of the corporate excess, the said Department of Corporations and Taxation determined the value of the corporate excess of your petitioner in the following manner, to wit: To the value of the property in Massachusetts shown on said report of your petitioner, and amounting to five hundred and seventy-three ($573.00) dollars, the said Department of Corporations and Taxation added a sum equal to that percentage of the total intangible assets of your petitioner, that the amount of income determined by the said Department of Corporations and Taxation as attributable to Massachusetts bore to your petitioner's total net income, and thus determined the total value of the assets of your petitioner in Massa-

chusetts to be ninety-nine thousand four hundred ($99,400.00) dollars, as shown in the letter from the said Department of Corporations and Taxation above referred to—Exhibit "C." Said sum of ninety-*four* thousand four hundred ($99,400.00) dollars was arrived at by said Department not as a valuation of said tangible property of the petitioner subject to taxation within the Commonwealth, but as a valuation of all the assets of the petitioner allocated by said Department as employed in any business within the Commonwealth, which assets consisted solely, except for said tangible assets amounting in value to five hundred and seventy-three ($573.00) dollars, of notes, bills and accounts receivable, the proceeds of sales made in the course of interstate commerce carried on by the petitioner solely as hereinbefore set forth. In determining the percentage of the total net income of the corporation to be attributed to the Commonwealth of [fol. 7] Massachusetts under the statutes aforesaid, the said Department of Corporations and Taxation held that the capital stock of the Alpha Portland Cement Company of Pennsylvania, amounting in value to four million five hundred thousand ($4,500,000.00) dollars, should be considered as an intangible and not a tangible asset of your petitioner, and that in determining the ratio that the five hundred and seventy-three ($573.00) dollars of office furniture bore to the total tangible assets of your petitioner, the said item of four million five hundred thousand ($4,500,000.00) dollars should not be considered as a tangible asset. In determining the percentage of the total net income of your petitioner to be allocated as attributable to business in Massachusetts, the Department of Corporations and Taxation took the proportion that the salaries paid to the four salesmen reporting to the Massachusetts office bore to the total salaries of all employees, and overruled your petitioner's contention that if this portion of the statutory basis of valuation were to be observed at all, it should be that proportion of the salaries that the time employed in soliciting business in Massachusetts bore to the total time of said salesmen, and that the salaries paid to the salesmen for selling goods in interstate commerce in other states than Massachusetts could have no legal relation to the business done by your petitioner in Massachusetts.

8. Thereafter and on or about the 23rd day of June, 1923, your petitioner paid the said sum of five hundred sixty-seven & 57/100 ($567.57) dollars, with interest thereon, amounting to a total of five hundred ninety & 54/100 ($590.54) dollars to the Commonwealth of Massachusetts, and received a receipt for the same. Your petitioner made the said payment under protest, alleging that the said tax was illegal and was not rightfully due from your petitioner.

9. The said tax assessed against your petitioner and paid under protest is illegal and void for the following reasons:

(a) The method of assessing said tax, as described above in paragraph "7th" hereof, is not in conformity with the proper construction of said statute.

(b) The imposition of the said tax against your petitioner is in violation of the Constitution of the United States, in that your petitioner is denied the rights and privileges assured to it therein, and in that the said tax so assessed against your petitioner is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce laws embodied in Article 8 of Section 1 of the Constitution of the United States.

[fol. 8] (c) That the said tax so assessed against your petitioner by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts is in violation of the Federal Constitution, in that it levies a tax upon property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(d) Your petitioner draws in question the validity of said Chapter 63 of the General Laws, and Chapters 361 and 493 of the Acts of 1921 and acts in amendment thereof. on the ground that said statutes are repugnant to the Constitution of the United States, in that they levy a tax which is a direct burden on interstate commerce, and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in Section 8 of Article 1 of the Constitution of the United States.

(e) Your petitioner draws in question the validity of said Chapter 63 of the General Laws and Chapters 361 and 493 of the Acts of 1921 and acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States, in that they levy a tax against property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

10. Wherefore your petitioner brings this petition against the Commonwealth of Massachusetts, the respondent herein, pursuant to the provisions of Section 77 of Chapter 63 of the General Laws, and prays that the aforesaid tax amounting with interest to five hundred ninety & 54/100 ($590.54) dollars,—paid to the Commonwealth of Massachusetts by your petitioner may be adjudged to have been illegally assessed, and that the amount thereof may be returned to your petitioner by said Commonwealth of Massachusetts, with interest from the date of payment, and for such other and further relief as to this Court may seem just.

Dated, Easton, Pa., July 9, 1923.

Alpha Portland Cement Company, by Jno. J. Matthes, Treasurer.

Filed July 11, 1923.

[fol. 9] Jurat showing the foregoing was duly sworn to by John J. Matthes omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

Form 355B. 1922

The Commonwealth of Massachusetts

Department of Corporations and Taxation No. —

Foreign Business Corporation Excise Tax Return

General Laws, Chapter 63

To be Filed within the First Ten Days of April, 1922, with the Commissioner of Corporations and Taxation, Division of Corporations, 237 State House, Boston

Received	Assessed	
Verification	Audited by	
Penalty	(Do not write above this line) Read Instruction Sheet	

Statement of (Name of corporation) Alpha Portland Cement Company, (Kind of business, specify in detail) Manufacture & Sale of Portland Cement, Post office address, Easton, Pa.

Location of principal office: (Street and street number) First National Bank Bldg., (City or Town) Easton, (State) Penna. Name of Treasurer: Jno. J. Matthes. Location of Massachusetts office: (Street and street number) Board of Trade Bldg., (City or Town) Boston.

Return of Income for the Calendar year ending December 31, 1921.

Schedule A.—Taxable Net Income as Reported in Last Federal Return Due Prior to April 1, 1922

Gross Income

1. Gross sales, less returns and allowances	$8,584,177 96		
2. Less cost of goods sold, exclusive of items called for separately below	4,181,661 88	$4,402,516 08	
3. Gross income from operations other than trading or manufacturing, less allowances		0	
4. Taxable interest on Liberty Bonds, etc		22,581 18	
5. Taxable interest from all other sources		7,919 01	
6. Rents		6,709 21	
7. Royalties		0	
8. Share of net income earned by personal service corporation (Whether received or not)		0	
9. Dividends on stock of foreign and domestic corporations		0	
10. Gross income from all other sources (Not including any amount reported in Item 23, below)		0	
11. Total of Items 1 to 10			$4,439,725 48

[fol. 11] Deductions

12. Expenses (except amounts reported in Item 2 above, or called for separately below)	$2,266,937 87		
13. Compensation of officers (in whatever form paid)	116,700 08		
14. Repairs (including labor, supplies, etc.)	724,591 51		
15. Interest	377 24		
16. Taxes	114,089 02		
17. Bad debts	9,311 27		
18. Exhaustion, wear and tear (including obsolescence)	453,788 02		
19. Depletion	23,771 31		
20. Amortization of war facilities			
21. Total of Items 12 to 20			$3,709,566 32
22. Item 11 Minus Item 21			$730,159 16
23. Profit or loss on sales of capital assets and miscellaneous investments	$ 0		
24. Losses by fire, storm, etc. (Extend difference between or sum of Items 23 and 24)	0		0
25. Net income exclusive of deductions for dividends (Item 22 minus 24, extended)			$730,159 16
26. Dividends deductible under Section 234 (a) 6 of the Revenue Act of 1921			0
27. Net Income (Item 25 minus Item 26)			$730,159 16

Schedule B.—Verification or Correction of Schedule A

(a) Since filing the Federal Return have any errors or inaccuracies in Items 1 to 27 inclusive been discovered? Ans. No.

(b) If so, state in detail upon a memorandum hereto annexed what corrections should be made.

(c) Has the Corporation received notice that the assessment made by the Federal Government is based upon a net income greater or less than is reported in Schedule A? Ans. No.

(d) If so, state upon a memorandum hereto annexed the amount of net income as computed by the Federal Government upon the latest determination by it of the proper tax, setting forth the facts giving rise to the difference.

Has the corporation received notification of any change in the amount of net income as determined by the Federal Government with respect to any previous year, return of which was required to be made under the laws of this Commonwealth? Ans. No.

If so, state for what year or years. ——.

Has the change been previously reported? Ans. ——.

Schedule C.—Corporate Excess

Table I.—Capital Stock

	Amount authorized	Amount issued and outstanding Apr. 1, 1922	Amount paid in thereon Apr. 1, 1922 (if installment stock)	Number of shares issued Apr. 1, 1922	Par value per share	Market value per share
Common.....	$23,000,000 00	$15,800,000 00	.....	158,000	$100 00	Not known.
1s Pref.	2,000,000 00	2,000,000 00	.....	20,000	100 00	Not known.
2d Pref.	.....	.....	.....	.....	.....	.....

[fol. 12] If stock is listed on Stock Exchange give name of Exchange. Not Listed.

If stock is not listed on Stock Exchange, state last four sales, giving the information called for in Table II. Do not include "wash" sales.

Table II—Sales of Stock

	Date of sale	Number of shares	Price per share	Public or private sale
Com.	All transfer of Alpha Stock transaction between individual stockholders consideration not known.			
Com.				
Com.				
Com.				
Com.				
1st Pref.				
1st Pref.				
1st Pref.				
1st Pref.				
2nd Pref.				
2nd Pref.				
2nd Pref.				
2nd Pref.				

Supplementary Statement

Table III—Net Earnings Last Five Years

Year ended	Net income (deficit) in Red)	Deductions	Additions	Net earnings (after taxes)	Number of shares	Dividends declared		
						Common	First preferred	Second preferred
1917	$559,313 30	$90,540 58	$1,475 81	$470,248 53	100,000	3 %	7%	..%
1918	489,007 35	220,700 76	116,998 82	385,305 41	100,000	3 %	7%	..%
1919	935,778 40	128,074 17	130,464 47	938,168 70	100,000	3 %	7%	..%
1920	1,268,541 51	341,266 09	34,410 62	961,686 04	100,000	6 %	7%	..%
1921	677,872 92	121,064 73	115,530 20	672,338 39	158,000	4½%	7%	..%
Total	.....	.....	.....	$3,427,747 07	.....	19½%	35%	....
Average...	.....	.....	.....	$685,549 41	.....	3.9%	7%	..%

[fol. 13]

Table IV.—Assets and Liabilities, April 1, 1922

Assets	Books of account	Value (actual)	Liabilities (Actual)	
Real estate	$621,848 37	.....	Capital stock	$17,800,000 00
Machinery	9,414,949 62	.....	Mortgages	0
Furniture, fixtures and tools.	29,946 68	.....	Notes payable	125,000 00
Autos, trucks and teams	60,292 21	.....	Accounts payable	781,685 77
Merchandise	3,616,971 30	.....	Other liabilities (naming items)	.....
Notes	31,803 88	.....	Wages	59,208 92
Accounts receivable	682,024 06	.....	Reserves	531,352 74
Securities	5,084,620 23	.....	Profit & loss	2,108,850 96
Cash	113,642 04	.....	.....	.....
Good Will	.....	.....		
Other assets (naming items).	1,750,000 00	.....	.....	.....
Total assets	$21,406,098 39	$.....	Total liabilities	$21,406,098 39

State any other facts that are material in determining "the fair cash value of all the shares constituting the capital stock."

Table A—Assets Employed in Business within Massachusetts (see Instruction Sheet)

	Value April 1, 1922
Real estate	None
Machinery	None
Merchandise	None
Other tangible property Office Furniture only	573 00
Portion of bank deposits in this and in other states employed in conduct of business within Massachusetts*	None
Portion of accounts receivable*	None
Portion of patents* $... Portion of good will* $... Total	.....
Portion of all other intangible assets employed in Massachusetts (itemize):*	.....
Total of assets employed in business within Massachusetts	$573 00

[fol. 14] Tangible Assets Employed in Business Outside Massachusetts

City or town and state	Real estate (col. 1)	Machinery (col. 2)	Merchandise (col. 3)	Other tangible prop. (col. 4)
Alpha, N. J. Martins Creek, Pa. Cementon, N. Y Jamesville, N. Y. Manheim, W. Va. Reynoldsville, W. Va. New York City Philadelphia, Pa Pittsburgh, Pa. Baltimore, Md. Chicago, Ill. Ironton, Ohio La Salle, Ill. Bellevue, Mich.	$621,848 37	$9,414,949 62	$3,616,971 30	$90,238 89
Total	$.....	$.....	$.....	$.....

Totals of Columns 1 to 4

1.	.....
2.	.....
3.	13,744,008 18
4.	.....
	$13,744,008 18

Intangible Assets Employed Outside Massachusetts (Itemize Below)

Portion of bank deposits employed outside*	$113,642 04	
Portion of accounts receivable*	713,827 94	
Total	$827,468 98	
Portion of patents* $... Portion of good will* $1,750,000.00: Total		1,750,000 00
Portion of all other intangible assets employed outside (itemize):* $5,084,620.23		5,084,620 23
Total of all assets employed in business whether within or without Massachusetts (include totals above)		$21,406,098 39

*Follow instruction sheet as to apportionment.

[fol. 15] Table B.—Tangible Property Situated Within Massachusetts (See Instruction Sheet)

Col. 1 City or town in which corporation has office, store or factory	Col. 2 Real state value April 1, 1922. See note	Col. 3 Machinery value April 1, 1922. See note	Col. 4 Merchandise value April 1, 1922	Col. 5 Other tangible prop. value April 1. 1922. See note	Col. 6 Amount of mortgage on real estate reported in col. 2
City or Town in which Corporation has no Office, Store or Factory.	$	$	$	$	$
Totals	$	$	$	$	$

NOTE.—In column 2, include works, structures, real estate, poles, underground conduits, wires and pipes owned within the commonwealth and subject to local taxation. In column 3, include only such machinery, as is owned by the corporation within the commonwealth, and as is subject to local taxation. Other machinery owned by the corporation, if any, should be included in column 5.

Question Supplemental to Table B

Does the corporation own no tangible property in Massachusetts, except furniture and equipment reasonably necessary for the use of the clerk or other executive officers of the corporation? Answer. No tangible property except sales office furniture.

Table C.—Securities Held in Massachusetts (Include Both Taxable and Non-taxable)

Col. 1 Amount of bonds or No. of shares stock	Col. 2 Complete description of securities by name and class or issue	Col. 3 Value April 1, 1922	Leave this column vacant
	None	$.....	.....
Total		$.....	.....

Schedule D.—Allocation of Income

1. Net income as shown in Schedule A as verified or corrected by Schedule B.....		$730,159 16	
2. Interest from bonds, notes, etc., of U. S. included in Federal return	$22,581 18		
3. Gains from the sale of capital assets exclusive of those described under Item 8 below.....	.....		
4. Total of Items 2 and 3.....		$22,581 18	
5. Difference between Items 4 and 1 (enter also in outside column.....		$707,577 98	$707,577 98

Items 6 and 7 to be Answered only by Corporations Carrying on Business Solely in Mass.

6. (a) Average fair cash value of machinery owned and used in Mass.	$.....	X Item 5 =	$.....
(b) Average value of total assets employed in Mass.....	$.....		
7. Difference between Items 6 and 5 = amount taxable at 2½%.....			$.....

[fol. 16] Items 8 to 17 to be Answered Only by Corporations Carrying on Business Outside Mass.

8. Gains from the sale of tangible capital assets situated within Mass.....		None.	
9. Interest from: Mass. corporations; associations, partnerships or trusts having transferable shares and having a principal place of business in Mass.; Mass. inhabitants; excepting interest from Trust Companies and from National Banks..		None.	
10. Total of Items 8 and 9 (enter also in outside column).....		None.	$707,577 98
11. Difference between Items 10 and 5 = remainder to be allocated		.....	
12. (a) Average value of tangible property in Mass.....	$573 00	X ⅓* of Item 11 =	$8 02
(b) Average value of all tangible property.....	$16,992,355 22		
13. (a) Wages, salaries, etc., assignable to Mass.....	$11,493 38	X ⅓* of Item 11 =	1,642 29

Table C.—Securities Held in Massachusetts—Continued

	(b) Total wages, salaries, etc.	$1,650,614 73	
14.	(a) Gross receipts assignable to Mass.	$343,204 60	
	(b) Gross receipts from all business	$10,717,546 43	X ⅓* of Item 11 = 7,552 22
15.	Total of Items 10, 12, 13 and 14		$9,202 53
16.	(a) Average fair cash value of machinery owned and used in Mass. $.....		
	(b) Average value of total assets employed in Mass. $.....		X Item 15 = ...
17.	Difference between Items 16 and 15 = amount taxable at 2½%		$9,202 53
18.	(a) Total dividends paid Massachusetts inhabitants for year ending Dec. 31, 1921		$843 00
	(b) 5% of same (see instruction sheet)		$42 15

Supporting Schedules

The following schedules, where applicable, must be made in support of Schedule D, and firmly attached to this Return:

Schedule D 3 and 8: Submit a detailed schedule of capital assets sold (not stock in trade), describing same and giving location of such of said assets as are tangible.

Schedule D 12: In this schedule state the method used in determining the average values used in Items 12 (a) and (b).

Schedule D 13: In this schedule specify the location of the premises to which wages are assignable and the amount assigned to each such place, whether within or without Mass.

Schedule D 14: In this schedule state amounts of sales and receipts assigned to each place of business, whether within or without Mass.

Schedule D 6 (b) or 16 (b): Submit a schedule describing the assets and stating their value and location.

* NOTE.—If only two of above proportions apply, substitute ½. If only one of above proportions applies, substitute 1. Do not fail to observe instructions on accompanying sheet.

[fol. 17] Supplemental Statement

No part of the debts of this corporation as set forth in this return has been incurred nor has any office, warehouse or other place of business been maintained in a state other than this commonwealth for the purpose of reducing the amount of taxes to be paid by said corporation.

The corporation, during the year above reported for, rented premises outside Massachusetts at the following places, and the premises were first rented to the corporation at or about the date set after the name of each such place:

Affidavit

I, the treasurer (or other principal officer) of the above-named company, being duly sworn, make oath that I have carefully examined the foregoing return, and I further make oath to the best of my knowledge and belief, and from such information as I have been able to obtain, that the items of income as set forth in Schedule A are a true copy of such items as they were included in its last return of income due prior to April 1, 1922, and made to the Collector of Internal Revenue, that, as verified or corrected by Schedule B, said items are true and accurate statements and that all other items, statements and all schedules in this return contained, including the accompanying schedules and statements, are true and accurate in each and every particular.

Signature of treasurer or other principal officer, Jno. J. Matthes.

Title of office, as for example "Treasurer," Treasurer.

Subscribed and sworn to before me, this 6th day of May, 1922.

J. G. Taylor, Notary Public—Justice of the Peace—Special Commissioner. My commission expires Jan. 17th, 1925.

The Commonwealth of Massachusetts

Department of Corporations and Taxation

Henry F. Long, Commissioner

237 State House, Boston

March 31, 1922.

Warner, Stackpole & Bradlee, 84 State St., Boston, Mass.

DEAR SIRS: I have yours of March 30 in regard to the Alpha Portland Cement Company. No penalty will be imposed if the excise tax return of this corporation is filed on or before May 10.

Very truly yours, Alexander Holmes, Deputy Commissioner.

The annexed report on Form 355B, and schedules annexed, for the year 1922, are filed by the Alpha Portland Cement Company [fol. 18] under compulsion and protest, and only for the purpose of

avoiding the imposition of the penalties provided by the Statutes of Massachusetts; and in conformity with the demand of the Department of Corporations and Taxation of the Commonwealth of Massachusetts made in connection with the Company's 1921 report.

The Alpha Portland Cement Company has commenced an action in the Supreme Judicial Court of Massachusetts, County of Suffolk, against the Commonwealth of Massachusetts regarding the 1921 tax, and contesting the validity thereof on the grounds that the tax assessed against it for 1921 is in violation of the Constitution of the United States, and praying for the repayment of the tax paid in 1921. This case is at issue, but has not yet been reached for trial. The condition of the Alpha Portland Cement Company has not changed since the institution of that suit, and in filing this return it raises the same objections as those raised against the payment of the 1921 tax. A similar suit is also pending for the 1920 tax.

While the attached report is prepared in conformity with the ruling of the Department of Corporations and Taxation of the Commonwealth of Massachusetts, the Alpha Portland Cement Company respectfully insists that the decision of the Department requiring the filing of this return is erroneous, and the Alpha Portland Cement Company specifically stipulates that the filing of this return shall not be considered as a waiver or abandonment of its rights to contest the validity of the said ruling or of any tax or fee which may be assessed against it; but contends that the Commonwealth of Massachusetts is without power or jurisdiction to assess such a tax against it, for the reason that the business of the corporation is purely interstate in its character and comes within the protection of the commerce clause and other clauses of the Federal Constitution, as shown by the following statement of fact:

The Alpha Portland Cement Company is incorporated under the laws of New Jersey for the purpose of manufacturing and selling cement. The home office is located at Easton, Pennsylvania. The corporation leases offices located at Rooms 619 and 620, Board of Trade Building, situated at State, Broad, Central and India Streets in Boston, which is its only office in Massachusetts. This office is in charge of a district sales manager, who himself travels in other states. The only other employee therein is a clerk. The salesmen, four in number including the district sales manager, solicit orders [fol. 19] in Massachusetts and other New England states, for cement packed in sacks, bags or barrels. Such orders are turned in at the said Boston office, and are then forwarded to the home office of the Company at Easton, Pa., where they are accepted or rejected. If accepted, the merchandise is shipped from the Company's mills located at Martins Creek, Pa., or Alsen, New York, direct to the consumer. Invoices are sent from Easton, Pa., direct to the consumer, and contain directions that payment be sent direct to Easton, Pa. No merchandise is kept in the said Boston office or elsewhere in Massachusetts in sample form or otherwise. Orders are taken by direct solicitation or by mail. Payments by customers are made direct to Easton, Pa., except certain delinquent accounts, which salesmen may at times endeavor to collect. No bank account is kept in

Massachusetts. Office rent and salaries are paid from Easton, Pa. Incidentals are paid from an impress account not exceeding $1,000, kept by the district sales manager in his own name. No books of records are kept in Massachusetts. No property of any kind is in Massachusetts, except a few hundred dollars worth of office furniture. No merchandise is shipped from one point in Massachusetts to another point in that state, nor from Massachusetts to any other state or country. No corporate meetings are held in Massachusetts, and no officer or agent of the company has any office in Massachusetts, except the district sales manager above mentioned.

Explanation of Computations in the Accompanying Report

The Alpha Portland Cement Company's Federal Tax return covering the year 1921 was a consolidated return, the other company participating in it being the Alpha Portland Cement Company of Pennsylvania.

Schedule C, Table A, First Section

The only assets which the Alpha Portland Cement Company has in Massachusetts are the articles of office furniture in the Boston office above described. Its value is $573.00. All expenses of said office and the New England Salesmen's Salaries are paid from the Company's office at Easton, Pa., the only funds in Massachusetts being the said impress account in the district sales manager's name not exceeding $1,000.

[fol. 20] Question Supplemental to Table B

No tangible property is owned by the Alpha Portland Cement Company in Massachusetts, except the office furniture above described. Said Boston office is under the supervision of the district sales manager, and no officer of the corporation uses it.

Schedule D, Item 12

The average value of all the tangible property of the corporation was computed by averaging the monthly balances for the year, giving as the result $12,492,355.22. To this amount was added $4,500,000.00, the investment of the Alpha Portland Cement Company in the stock of the Alpha Portland Cement Company of Pennsylvania, a subsidiary company, through which the Alpha Portland Cement Company holds certain properties within the State of Pennsylvania. Under the laws of Pennsylvania, the Alpha Portland Cement Company, being a New Jersey corporation, is limited in its holdings of real estate in Pennsylvania, and because of this limitation title to the mills in Pennsylvania is vested in the Alpha Portland Cement Company of Pennsylvania, all of the stock of which is owned by the Alpha Portland Cement Company. The latter company operates the mills in Pennsylvania and derives all the income therefrom, the Alpha Portland Cement Company merely crediting the subsidiary

company with a nominal sum as rent to cover depreciation. Since the income from the Pennsylvania mill is included in the income in this report, the said $4,500,000.00, representing the value of the Pennsylvania mill hsould be included in the value of all the tangible property of the company, as shown in Schedule D, Item 12B. The New York Court of Appeals held that an assessment, ignoring the value of properties under these conditions, but including the inrome therefrom, was unconstitutional. People ex rel. Alpha Portland Cement Company vs. Knapp, 230 N. Y. 48. A petition to the Supreme Court of the United States for a writ of certiorari was denied. Item 12B has, therefore, been taken as $16,992,355.22.

Schedule D, Item 14

The New England salesmen cover not only the State of Massachusetts, but most of the New England States, except the salesman for the State of Connecticut, who does not travel outside of that state. [fol. 21] Salaries paid to the New England salesmen, not including the Connecticut salesman, are $18,060.00. The Alpha Portland Cement Company contends that it is not doing business in Massachusetts, and it is clear that in no event could more than that proportion of the salesmen's salaries be charged to the Massachusetts business than the percentage of the gross receipts from Massachusetts purchasers to the gross receipts from the New England sales, which amounts to $343,204.60.

Schedule D, Item 13A is, therefore $11,493.38.

Dated, May 6th, 1922.

Alpha Portland Cement Company, by Jno. J. Matthes, Treasurer.

Form 355 L, 1922 Revision

The Commonwealth of Massachusetts

Department of Corporations and Taxation

Reasons for Late Filing

To accompany business corporation excise tax return, when filed late. The mere filing of this form will not insure abatement of penalties. Penalties for late filing may be abated only when good cause is shown.

Name of Corporation: Alpha Portland Cement Co.
Post Office address: Easton, Pa.
Accompanying return due within the first ten days of April, 1922.

1. Was it impossible for the above-named corporation to file a proper return within the first ten days of April? Ans. Yes.

2. Is the accompanying return presented for filing as promptly as it was possible for the corporation to obtain the data required to fill out the return and properly prepare it for filing? Ans. Yes.

3. State below the specific reasons, if any, why it was not possible to file the return more promptly. Part of our records are kept in Chicago, and part in Easton, Pa., and Chicago books were not closed so return could be made earlier.

Affidavit

I, the undersigned, treasurer (or other principal officer) of the above-named corporation, being duly sworn, make oath that the above answers and statements are true.

(Signature of treasurer or other principal officer:) Jno. J. Matthes, Treasurer (title of office).

Subscribed and sworn to before me this 6th day of May, 1922. John G. Taylor, Notary Public. My commission expires January 17, 1925.

[fol. 22] Alpha Portland Cement Company

Statement Showing Dividends Paid to Stockholders Resident of the State of Massachusetts During the Year Ending December 31, 1921

L. S. Brown, 317 Main St., Springfield, Mass.....	$135 00
Dorothy M. Chapman, 300 Clinton Road, Brookline, Mass.	708 00

Exhibit "B" to Petition

Form 355-J, 1922 Revision

Foreign Business Corporation

The Commonwealth of Massachusetts

Department of Corporations and Taxation

Division of Corporations

Room 237 State House

Duplicate Bill

Received payment. Paid 6-29-23. H. F. Long. 2.

Boston, September 20, 1922.

To Alpha Portland Cement Company, J. J. Matthes, Treas., First National Bank Bldg., Easton, Pa., 58.9:

Your excise due The Commonwealth of Massachusetts, in accordance with the provisions of Chapter 63, General Laws, and Acts in Amendment thereof and in Addition thereto, is as follows:

Corporate Excess (April 1, 1922), $75,932.08 Taxable at $5 per $1,000		$379 66
Net Income $9,202.53, Taxable at 2½ per cent	$230 06	
Less 5 per cent of Dividends Paid Massachusetts Inhabitants	$42 15	
		187 91
Minimum Tax		.....
Penalties for late filing of return		.....
Total Amount of Tax Due		$567 57
Abated		$.....
Net Tax		.....
Interest		$22 97
Costs		.....
Amount Paid		$590 54

1922.

[fol. 23] Send this bill with check payable to the Commonwealth of Massachusetts to the treasurer of the Commonwealth, room 227, State house, Boston, Mass.

Notice is hereby given that the above amount will be due and payable, at the Treasurer's Office, Room 227, State House, thirty days from date hereof. Application for abatement of correction of tax may be made to the Commissioner within thirty days from the date of this notice. To avoid interest the tax should be paid when due. Six per cent interest will be charged if tax is not paid when due; 12 per cent if payment is delayed until proceedings are commenced.

Treasurer's office hours, 9 a. m. to 2 p. m.; Saturdays, 9 a. m. to 12 m.

Payment of this tax received through Attorney General's office.

Henry F. Long, Commissioner.

EXHIBIT "C" TO PETITION

The Commonwealth of Massachusetts

Department of Corporations and Taxation

Division of Corporations

Harold S. Lyon, Director. Henry F. Long, Commissioner

237 State House, Boston, September 26, 1922.

Porter & Taylor, Counsellors at Law, 30 Broad Street, New York.

Alpha Portland Cement Company

GENTLEMEN: In reply to your inquiry as to the method of assessing and computing the Excise Tax upon the above-named corporation, the following statement is submitted.

That portion of the tax which relates to corporate excess was determined as follows:

The fair cash value of all the shares constituting the capital stock was ascertained by the Commissioner to be			$16,352,162
Assets employed in Massachusetts	$99,400		
Total assets employed	$21,406,098	X share =	75,352 08

From this value there was deducted:

Equity in real estate within the Commonwealth	$	
Machinery within the Commonwealth		
Securities deductible		
Corporate excess		$75,932 08
Tax at $5 per $1,000		379 66

[fol. 24] That portion of the tax which relates to income was determined as follows:

Net income attributable to Massachusetts	$9,202 53
Tax at 2½%	230 06
Less 5% of Dividends paid Massachusetts inhabitants	42 15
Net tax due	$187 91

Respectfully yours, Henry F. Long, Commissioner, by Harold S. Lyon, Director.

IN SUPREME JUDICIAL COURT

ANSWER

The respondent, Commonwealth of Massachusetts, for answer to the petition in the above cause, says as follows:

1. The respondent admits that the petitioner is a foreign corporation organized and existing under and by virtue of the laws of the State of New Jersey. It is ignorant as to the extent to which the petitioner is engaged in interstate commerce throughout the United States, and leaves the petitioner to prove the same so far as material. It admits that the petitioner maintains an office in the city of Boston in this Commonwealth. It denies that said office is used exclusively for conducting interstate commerce, and says that said office is a usual place of business of the petitioner.

2. The respondent admits that the petitioner, by salesmen engaged by it, solicits orders from customers resident in Massachusetts and neighboring states and that it transmits such orders from its office in Massachusetts to its office at Easton in the Commonwealth of Pennsylania. The respondent denies that the petitioner's activities within the Commonwealth of Massachusetts are exclusively confined to such solicitation and transmission, that the petitioner has confined its operations within this Commonwealth to the solicitation and execution of orders, that all said orders are accepted or rejected at Easton in the Commonwealth of Pennsylvania, and that acceptance of all orders takes place outside Massachusetts. The respondent is [fol. 25] ignorant as to the purpose for which the petitioner entered this Commonwealth, and leaves the petitioner to prove the same, if material. It denies all other allegations contained in paragraph 2 of the petition.

3. The respondent admits that the business of the petitioner consists of the manufacture and sale of cement, that the business here is conducted by employees, and that the business here is conducted as admitted by paragraph 2 of this answer. In denies all other allegations of paragraph 3 of the petition.

Further answering, the respondent says that the petitioner has property located in Massachusetts, ships merchandise to residents of Massachusetts, solicits and negotiates sales from its place of business and elsewhere in Massachusetts, conducts correspondence and pays expenses at said place of business, and performs and carries on in this Commonwealth divers other functions and activities incident to its business of manufacturing and selling cement.

4. The respondent admits that the petitioner on or about May 6, 1922, filed under a protest a return for the year 1922 in substantially the form set forth in Exhibit A annexed to the petition. The respondent denies each and every other material allegation of paragraph 4 of the petition.

5. The respondent admits that on or about September 20, 1922, the Commissioner of Corporations and Taxation assessed against the petitioner, under the provisions of G. L., c. 63, and acts in amendment thereof and in addition thereto, an excise for the year 1922, in the sum of Five hundred sixty-five and 57/100 (565.57) dollars; that said assessment was based upon information contained in said return (as well as upon other available information); that the Commissioner duly notified the petitioner of said assessment; and that Exhibit B annexed to the petition is a substantially accurate copy of said notification. The respondent denies each and every other material allegation of paragraph 5 of the petition.

6. The respondent admits, if material, that a letter was sent by the Commissioner of Corporations and Taxation to Messrs. Porter & Ttaylor on or about September 26, 1922, as alleged in paragraph 6 of the petition.

7. In answer to paragraph 7 of the petition the respondent says as follows:

In accordance with the provisions of Gen. St. 1919, c. 355, § 22, (G. L., c. 63, § 47,) the Commissioner of Corporations and Taxation made and published the following general ruling:

[fol. 26] "2505. Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable in Massachusetts under the provisions of section 19 of the act bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The department also reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified."

The petitioner filed its return unaccompanied by any request for a determination by any other than the method set forth in ruling No. 2505, nor was any such request thereafter submitted to the Commissioner, either prior to or after assessment of the excise.

Pursuant to ruling No. 2505 and the provisions of G. L., c. 63, and upon the basis of the information furnished by said return, the Commissioner determined the value of the corporate excess of the petitioner employed within the Commonwealth in the following manner, to wit:

The portion of the remainder of income allocable to Massachusetts under the provisions of G. L., c. 63, § 41, (Gen. St. 1919, c. 355, § 19,) was shown by said return to amount to $9,902.53, (Schedule D, item 15). The total of said remainder was shown by said return to amount to $707,577.98, (Shedule D, items 5 and 10). The intangible assets employed in business were shown to consist of the following items (Schedule C, Table A):

Bank deposits and accounts receivable	$827,469.98
Good will	1,750,000.00
Other intangible assets	5,084,620.23
Total	$7,662,090.21

Using these figures for the purpose of determining the proportion in accordance with said ruling No. 2505, but erroneously taking the figures $7,602,090.21, instead of $7,662,090.21, as the figure representing the total of intangible assets, the Commissioner, by the following computation, to wit: $\frac{9,203}{707,578} \times 7,602,090.21 = 98,827.17$, determined $98,827.17 to be the value of the intangible assets em- [fol. 27] ployed in business within the Commonwealth. Adding to this figure the value of the tangible assets employed in business in Massachusetts, shown by said return to amount to $573.00 (Schedule C. table A), the Commissioner determined the total value of all assets of the petitioner employed in business in Massachusetts to be $99,400.00.

Pursuant to the provisions of G. L., c. 63, § 30, par. 4, the Commissioner determined the fair cash value of all the shares constituting capital stock on April 1, 1922, to be $16,352,162.00. He determined the value of the total assets of the corporation to be $21,406,098.00, as shown by said return (Schedule C, Table IV). The Commissioner then, having found that the value of the assets employed in business within the Commonwealth was $99,400.00, as herein above stated, determined the value of the corporate excess employed within the Commonwealth, according to the rule provided by G. L., c. 63, § 30, par. 4, to be $75,932.08, the computation being as follows, to wit: $\frac{99,400}{21,406,098} \times 16,352,162 = \$75,932.08$

The amount of the tax on said corporate excess, at the rate of five dollars per thousand, the Commissioner determined to be $379.36.

No application for abatement of the excise assessed to the petitioner, pursuant to G. L., c. 63, § 51, was seasonably filed by the petitioner.

Except as herein admitted, the respondent denies each and every material allegation of paragraph 7 of the petition.

8. The respondent admits that the petitioner paid to the Commonwealth the sum of $567.57, with interest thereon in the sum of $22.97, amounting to a total of $590.54. It says that payment was made on or about June 30, 1923, and not on or about June 23, 1923, as alleged. The respondent denies each and every material allegation of paragraph 8 of the petition, except as herein expressly admitted.

9. The respondent denies the allegations of paragraph 9 of the petition.

10. Further answering, the respondent says that on November 30, 1921, the petitioner herein filed its petition against the Commonwealth of Massachusetts, respondent herein, for the recovery of taxes

for the year 1921 claimed to have been illegally assessed, for the reasons set forth in said petition as follows:

"(a) The imposition of the said tax against your petitioner is in violation of the Constitution of the United States in that your petitioner is denied the rights and privileges assured to it therein and in that the said tax so assessed against your petitioner is a direct [fol. 28] burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in section 8 of article I of the Constitution of the United States.

(b) That the said tax so assessed against your petitioner by the Commissioner of Corporations and Taxation of the Commonwealth of Massachusetts is in violation of the Federal Constitution in that it levies a tax upon property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States.

(c) Your petitioner draws in question the validity of said chapter 63 of the General Laws and chapters 361 and 493 of the Acts of 1921 and Acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States in that they levy a tax which is a direct burden on interstate commerce and constitutes an unlawful regulation of interstate commerce in contravention of the commerce clause embodied in section 8 of article I of the Constitution of the United States.

(d) Your petitioner draws in question the validity of said chapter 63 of the General Laws and chapters 361 and 493 of the Acts of 1921 and Acts in amendment thereof, on the ground that said statutes are repugnant to the Constitution of the United States in that they levy a tax against property of your petitioner situated without the limits of the Commonwealth of Massachusetts, thereby depriving your petitioner of its property without due process of law, in contravention of the Fourteenth Amendment to the Constitution of the United States."

The respondent further says that in said cause an anwer was filed denying the allegations hereinabove quoted, that the issues thereby raised were all determined favorably to te respondent, and that a final decree therein has been entered after rescript from the Full Court dismissing the petition with costs to the petitioner. The respondent says that the petitioner is thereby concluded as to the issues hereinabove set forth.

Commonwealth of Massachusetts, by Alexander Lincoln, Assistant Attorney General.

Filed September 12, 1923.

[fol. 29] IN SUPREME JUDICIAL COURT

AGREED STATEMENT OF FACTS

In the above cause it is hereby agreed that the facts hereinafter stated, so far as competent, relevant and material, shall be taken as true; and the court may draw inferences from the facts herein stated.

1. The petitioner, Alpha Portland Cement Company, is a corporation organized and existing under the laws of the State of New Jersey. Its principal office is located at Easton, Pennsylvania. The petitioner is engaged in the manufacture and sale of cement, and has mills located in the States of New York, Pennsylvania, New Jersey, West Virginia, Ohio, Illinois and Michigan. Cement packed in sacks, bags or barrels is shipped from these mills to various points in the United States and foreign countries, both by rail and water.

2. The petitioner's activities within the Commonwealth of Massachusetts are as follows: It leases two rooms in the Board of Trade Building, situated at State, Broad, Central and India Streets, in the city of Boston, which is the only office of the petitioner in Massachusetts. The said office is in charge of a district sales manager, the only other employee therein being a clerk. This clerk is a stenographer and typist, and as such writes such letters as are sent out from the Boston office. He makes up the orders that are turned in at the Boston office, as explained herein, on certain forms which the company has for its business, and encloses them in an envelope addressed to the Eastern office, where they are accepted or rejected. He keeps a record of shipments into the New England territory. He receives from Easton copies of all the invoices covering materials shipped to any customer in the New England states and enters them on a card of record, and periodically turns this information over to salesmen in whose territory shipments have been made. He of course looks after such additional duties as are consistent with any office. The office is used as headquarters by traveling salesmen employed by petitioner, who are four in number, including the district sales manager, who himself travels. These salesmen solicit orders in the Commonwealth of Massachusetts and in other New England states for cement manufactured by petitioner. Orders taken by the salesmen are turned in at said sales office, and are then forwarded by mail to the principal office of the company at Easton, Pennsylvania. When the orders so forwarded reach the principal office they are either accepted or rejected. If accepted, the merchandise [fol. 30] called for is shipped from the petitioner's mills, located at Martins Creek, Pennsylvania, or Alsen, New York, direct to the customer. When shipment is made, invoices are prepared at the principal office at Easton, Pennsylvania, and mailed directly to the customer. The invoices contain a direction that funds in payment be sent directly to the principal office. In substantially all cases the orders are taken by the salesmen upon personal solicitation at the customer's place of business, but there are also a few instances in

which the customer forwards the order by mail to the Boston office, and a few very exceptional cases where a customer gives an order at the Boston office. In every case, however, the orders are forwarded to the principal office at Easton, Pennsylvania, for acceptance or rejection. In no case and under no circumstances are any orders accepted or rejected by the Boston office. Funds in payment for the merchandise shipped are sent by the customer to the principal office at Easton, Pennsylvania, as above stated; but in cases of delinquent accounts or bad credit risks, the credit department at Easton, in approving the contract, sometimes sends word to the salesman that such an order would only be shipped upon receipt of check in advance. In that case the salesman calls again on the customer and explains the situation, and in some instances receives a check. The salesman sends it first to the Boston office, from where it is transmitted to the main office at Easton; or, if there is any hurry, the salesman sends the check directly to Easton. In no case is the check made payable to salesmen, but is always payable to the Alpha Portland Cement Company, and is deposited by it at its Easton office. In case of some overdue accounts, salesmen are sometimes authorized to request and receive payment. The latter cases are comparatively rare, and are exceptions to the ordinary course of business: but when funds are so collected by salesmen they are forwarded to the principal office at Easton, Pennsylvania.

3. No merchandise is kept in the said sales office in sample form or otherwise, nor in any part of the Commonwealth of Massachusetts. None of the merchandise sold to customers is produced or purchased in Massachusetts, all of it being produced in the petitioner's mills at Alsen, New York, or Martins Creek, Pennsylvania, and shipped from one of the said mills to the customer. No shipments are made from one point in Massachusetts to another point in that Commonwealth, nor from a point in Massachusetts to a point outside of that Commonwealth. The only tangible property owned by petitioner [fol. 31] in the Commonwealth of Massachusetts, real or personal, is the office furniture in the sales office, valued at about $500 Of the intangible assets there are none having a situs in Massachusetts for purposes of property taxation except in so far as the corporate franchise employed within the boundaries of the Commonwealth in transactions in interstate comerce as herein set forth and credits arising from the sale of cement to residents of Massachusetts may be considered as having such situs. No bank account is kept in Massachusetts. The salesmen's salaries any office rent are sent directly from the principal office at Easton, Pennsylvania. Incidental expenses in Massachusetts are paid from an account kept by the district sales manager in his own name, which does not exceed $1,000. Stockholders', directors' or other corporate meetings have never been held in Massachusetts, and no officer or agent of petitioner has an office there except the district sales manager's office, above specified. No books or records are kept in Massachusetts except as above noted.

4. On May 6, 1922, the petitioner filed, under protest, an excise tax return for the year 1922, with schedules and other papers an-

nexed thereto. Copies of said return, schedules and papers are annexed to the petition as Exhibit A, and are made a part of this agreed statement of facts.

5. On September 20, 1922, the Commissioner of Corporations and Taxation assessed against the petitioner, under the provisions of G. L., c. 63, and acts in amendment thereof and in addition thereto, an excise for the year 1922 in the sum of $567.57. The Commissioner duly notified the petitioner of said assessment. A copy of such notification is annexed to the petition as Exhibit B, and is made a part of this agreed statement of facts.

6. In accordance with the provisions of Gen. St. 1919, c. 355, § 22, re-enacted as G. L., c. 63, § 47, the Commissioner of Corporations and Taxation in May, 1920, made and published the following general ruling, which has never been repealed and has since continuously been in force:

"2505. Ordinarily, such proportion of an intangible assets employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable in Massachusets under the provisions of section 19 of the act bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The department also [fol. 32] reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified."

The petitioner filed its return unaccompanied by any request for a determination by any other than the method set forth in ruling No. 2505, nor was any such request thereafter submitted to the Commissioner, either prior to or after assessment of the excise.

Pursuant to ruling No. 2505 and the provisions of G. L., c. 63, and upon the basis of the information furnished by said return, the Commissioner determined the value of the corporate excess of the petitioner employed within the Commonwealth in the following manner, to wit:

The portion of the remainder of income allocable to Massachusetts under the provisions of G. L., c. 63, § 41, (Gen. St. 1919, c. 355, § 19) was shown by said return to amount to $9,202.53 (Schedule D, item 15). The total of said remainder was shown by said return to amount to $707,577.98 (Schedule D, items 5 and 10). The intangible assets employed in business were shown to consist of the following items (Schedule C, Table A):

Bank deposits and accounts receivable	$827,469.98
Good will	1,750,000.00
Other intangible assets	5,084,620.23
Total	$7,662,090.21

Using these figures for the purpose of determining the proportion in accordance with said ruling No. 2505, but inadvertently taking the figures $7,602,090.21, instead of $7,602,090.21, as the figure representing the total of intangible assets, the Commissioner, by the following computation, to wit: $\frac{9,203}{707,578} \times 7,602,090.21 = 98,827.17$, determined $98,827.17 to be the value of the intangible assets employed in business within the Commonwealth. Adding to this figure the value of the tangible assets employed in business in Massachusetts, shown by said return to amount to $573.00 (Schedule C, Table A), the Commissioner determined the total value of all assets of the petitioner employed in business in Massachusetts to be $99,400.00.

Pursuant to the provisions of G. L., c. 63, § 30, par. 4, the Commissioner determined the fair cash value of all the shares constituting capital stock on April 1, 1922, to be $16,352,162.00. He determined the value of the total assets of the corporation to be $21,[fol. 33] 406,098.00, as shown by said return (Schedule C, Table IV). The Commissioner then, having found that the value of the assets employed in business within the Commonwealth was $99,400.00, as herein above stated, determined the value of the corporate excess employed within the Commonwealth, according to the rule provided by G. L., c. 63, § 30, par. 4, to be $75,932.08, the computation being as follows, to wit: $\frac{99,400}{21,406,098} \times 16,352,162 = \$75,932.08$.

The amount of the tax on said corporate excess, at the rate of five dollars per thousand, the Commissioner determined to be $379.66.

In accordance with the provisions of G. L., c. 63, and acts in amendment thereof and in addition thereto, the Commissioner determined the amount of the tax on net income derived from business carried on within the Commonwealth to be $187.91, making the total excise $567.57, as herein above stated.

No application for abatement of the excise assessed to the petitioner, pursuant to G. L., c. 63, § 51, was seasonably filed by the petitioner.

7. On September 26, 1922, the Commissioner of Corporations and Taxation sent a letter to the petitioner's attorneys, Messrs. Porter and Taylor. A copy of said letter is annexed to the petition as Exhibit C, and is made a part of this agreed statement of facts.

8. On June 30, 1923, the petitioner paid to the Commonwealth, under protest, the sum of $590.54, of which $567.57 was in payment of the total amount of the tax due, and the balance of $22.97 was in payment of interest thereon.

9. No question is made for the purposes of this case but that the mathematical computations of the Commissioner were correct, and that in so far as the assessment of the tax here in question depended

upon or involved a valuation of specific items of assets in assessing the tax as herein set forth, the valuation of said specific items was fair.

10. Pursuant to G. L., c. 63, § 77, the petitioner filed its petition for the recovery of the tax so paid within six months from the date of payment.

11. On November 30, 1921, the Alpha Portland Cement Company, the petitioner herein, filed a petition against the Commonwealth of Massachusetts, respondent herein, for the recovery of taxes for the year 1921, claimed to have been illegally assessed. Thereafter, [fols. 34–86] the respondent filed an answer to the petition and an agreed statement of facts was executed and filed by the parties. The case thus presented was reserved for the consideration and determination of the Full Court, and was heard by said court, and the court ordered the petition dismissed with costs. A final decree dismissing the petition, with costs to the respondent, was thereupon entered prior to the filing of the petition herein. A writ of error from the Supreme Court of the United States was allowed, and bond on writ of error approved, by the Chief Justice of this court and said writ of error was entered in the Supreme Court of the United States on June 29, 1923. Copies of the petition, answer, agreed statement of facts, reservation, opinion and rescript of the Full Court, final decree and papers on writ of error are hereto annexed and made a part of this agreed statement of facts.

Warner, Stackpole & Bradlee, Attorneys for Petitioner. Alexander Lincoln, Assistant Attorney General.

Filed October 3, 1923.

[fol. 87] IN SUPREME JUDICIAL COURT

FINAL DECREE—Filed Oct. 5, 1923

This cause came on to be heard upon the petition, answer and an agreed statement of facts, and thereupon, in consideration thereof, it is

Ordered, adjudged and decreed that the petition be dismissed.

By the Court.

John F. Cronin, Clerk.

[fol. 88] IN SUPREME JUDICIAL COURT

NOTE OF APPEAL TO FULL BENCH—Filed Oct. 5, 1923

Now comes the petitioner in the above entitled cause and appeals to the full bench of the Supreme Judicial Court from the final decree, dismissing the petition entered October 5, 1923.

By its attorneys, Warner, Stackpole & Bradlee. E. A. M.

[File endorsement omitted.]

[fol. 89] In Supreme Judicial Court of Massachusetts

[Title omitted]

Rescript from Full Bench—Filed Feb. 28, 1924

Ordered, that the clerk of said court in said county make the following entry under said case in the docket of said court; viz: Petition dismissed with costs.

By the court.

Walter F. Frederick, Clerk.

[File endorsement omitted.]

[fol. 89½] Brief Statement of the Grounds and Reasons of the Decision

The reasons of the decision are set forth at length in the opinion filed with the reporter of decisions, to which reference is made.

[File endorsement omitted.]

[fol. 90] In Supreme Judicial Court

[Title omitted]

Final Decree on Rescript—Filed March 7, 1924

The above entitled cause came on to be further heard after rescript from the Full Court, and upon consideration thereof it is

Ordered, adjudged, and decreed that the petition be and it hereby is dismissed with costs to the respondent taxed in the sum of thirty-eight dollars and sixteen cents ($38.16), and execution issue therefor.

By the Court.

John F. Cronin, Clerk.

March 7, 1924.

Certificate to foregoing paper omitted in printing.

[fol. 91] [File endorsement omitted.]

[fol. 92] IN SUPREME JUDICIAL COURT

CLERK'S CERTIFICATE

All and singular which premises we have held good by the tenor of these presents to be exemplified.

In testimony whereof we have caused the seal of our said Court to be hereto affixed.

Witness Arthur P. Rugg, Esquire, Chief Justice of our said Supreme Judicial Court, at Boston, this fourteenth day of March in the year of our Lord one thousand nine hundred and twenty-four.

John F. Cronin, Clerk. (Seal.)

[fol. 93] IN SUPREME JUDICIAL COURT

[Title omitted]

OPINION—Filed March 4, 1924

Present: Rugg, C. J., Braley, Pierce, & Carroll, JJ.

RUGG, C. J.:

This is a petition under G. L. c. 63, §77, to recover an excise alleged to have been extracted from the petitioner illegally for the year 1922. This section of the statute enables a corporation to bring before this court the inquiry whether there has been a wrongful assessment of a tax or excise upon that which was not the proper subject of taxation. A corporation cannot by petition under this section cause inquiry to be made whether there has been an overvaluation of that which is rightly subject to the tax or excise, relief for wrong of that nature being afforded by G. L. c. 63, §§51, 71. Boston Manuf. Co. v. Commonwealth, 144 Mass. 598. Attorney General v. East Boston Land Co. 222 Mass. 24.

The petitioner is a corporation organized under the laws of New Jersey, engaged in business in this Commonwealth. Its only tangible property within this Commonwealth is office furniture of a value of $573. It conducts within this Commonwealth, in the sale and delivery of cement and the maintenance of a sales force, an extensive business exclusively interstate in character. Its nature and extent are described in Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, in substantially the same general terms as shown on this record and need not now be repeated.

[fol. 94] The excise here assailed was levied under the provisions of G. L. c. 63, §§30-43, both inclusive, § 52, and St. 1921, c. 361. All these sections are printed in 244 Mass. 532-543, and need not here be recited. It is provided by G. L. c. 63, §47, that the commissioner of corporations and taxation "shall make from time to time such

reasonable rules and regulations, consistent with sections thirty to fifty-one, inclusive, as he may deem necessary for carrying out their provisions." Pursuant to that mandate the commissioner made a general ruling of the following tenor: "2505 Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable in Massachusetts under the provisions of section 19 of the act bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The department also reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified." The petitioner filed its return and made no request for determination by any other method. So far as this method affects valuation, it is not open to inquiry in this proceeding. The remedy for a wrong of that nature would be under §§51, 71.

This statute in its application to the present petitioner was considered at length in Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530. The purpose of bringing the present petition respecting the excise levied for the year succeeding that under investigation in the earlier case apparently is to make certain the view of this court as to points thought by the petitioner not to have been fully developed there, in order that the Supreme Court of the United States on writ of review may have before it all aspects of the statute.

The method of calculation of the excise is set out with greater de- [fol. 95] tail in the present than in the earlier record. The basis of the excise is the value of the corporate excess employed within the Commonwealth and the net income derived from business within the Commonwealth. Thus the express terms of the statute confine its operation and effect to property located and net income earned within the Commonwealth. Without pursuing the details of the method of computation to ascertain these two elements, it is enough to say that it is in conformity to the statute. This conclusion finds confirmation in the fact that the petitioner failed to exercise the option, extended to it by the ruling of the commissioner already quoted, of requesting an apportionment by some other method.

The petitioner founds its objections to the statute on no narrow ground. The only contention now urged by it stated broadly is that the tax is illegal and in violation of its rights under the federal Constitution. That contention is understood to mean that, as matter of constitutional right, the only factor capable of being used to ascertain the excise due from it is the tangible personal property owned by it and located in this Commonwealth, that is to say, its office furniture worth $573. It is said in the brief of the learned counsel for the petitioner: "In the former case it was stipulated that the amount of the tax assessed was not questioned, and while in the

court's opinion reference was made to the petitioner's intangible assets, the extent to which the valuation of corporate excess consisted of a valuation of these intangible assets arising solely from the conduct of interstate commerce did not appear. If in the former case the court intended to construe the statute as including as assets employed in business within the Commonwealth these intangibles constituting a part of and arising exclusively from the conduct of interstate commerce, why that is of course the end of this case."

The former decision rested in its ultimate analysis upon the theory that under the statute the excise might be measured in part upon intangible assets of the petitioner having a situs in this Commonwealth and arising exclusively from the conduct of its interstate [fol. 96] business. We understand that credits due from residents within this Commonwealth to nonresidents may be made the subject of direct property taxation here. Metropolitan Life Ins. Co. of New York v. New Orleans, 205 U. S. 395. Liverpool & London & Globe Ins. Co. v. Orleans Assessors, 221 U. S. 346. Board of Assessors v. Comptoir National D'Escompte, 191 U. S. 388. Shaffer v. Carter, 252 U. S. 37, and cases there reviewed. The source from which such credits arise is not material. They are not immune from taxation because coming into existence though the transaction of interstate commerce. That being so, it would seem that such credits may be used as a measure of an excise levied indifferently upon all corporations under a general law.

The case at bar appears to us to be governed in every essential particular by the authority of Alpha Portland Cement Co. v. Commonwealth, 244 Mass. 530, and the decisions there collected and reviewed. Its reasoning is adopted without discussion as decisive of the case at bar.

Petition dismissed with costs.

J. G. Palfrey, L. H. Porter & H. Twombly, for the petitioner.

J. R. Benton, Attorney General, & A. Lincoln, Assistant Attorney General, for the Commonwealth.

[fol. 97] Certificate to foregoing paper omitted in printing.

[fol. 98] IN SUPREME JUDICIAL COURT

[Title omitted]

PETITION FOR WRIT OF ERROR—Filed March 12, 1924

Now comes the Alpha Portland Cement Company, and says that on the 7th day of March, 1924, the Supreme Judicial Court, within the County of Suffolk, and Commonwealth of Massachusetts, entered final judgment herein in favor of the above named respondent and against the above named petitioner, in which judgment and the proceedings had prior thereto in said cause certain errors were committed to the prejudice of the above named petitioner, all of which appear in the assignment of errors which is filed with this petition.

Wherefore, the undersigned corporation, being the petitioner aforesaid, prays that a writ of error may be issued in its behalf out of the Supreme Court of the United States to the end that the errors so complained of may be corrected and the said judgment reversed, and that [fol. 99] a transcript of the record, proceedings and papers in this suit, duly authenticated, may be sent to the Supreme Court of the United States.

Alpha Portland Cement Company, by Louis H. Porter, F. Carroll Taylor, John G. Palfrey, Its Solicitors.

Certificate to foregoing paper omitted in printing.

[fol. 100] IN SUPREME JUDICIAL COURT.

[Title omitted]

ASSIGNMENT OF ERRORS

Now comes the Alpha Portland Cement Company, your petitioner in the above entitled cause, being the plaintiff-in-error herein, and with its petition for a writ of error makes and files the following assignment of errors, and says that there is manifest error in the records and proceedings in the above entitled cause, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

(1) The Massachusetts Supreme Judicial Court erred in holding that the provisions of the Massachusetts Excise Tax on foreign corporations, as contained in Chapter 63 of the General Laws of the Commonwealth of Massachusetts, and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Act of 1921, as applied to the plaintiff-in-error were [fol. 101] constitutional and not in violation of the provisions of the Commerce Clause contained in Section VIII, Article I of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(2) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose an excise tax upon a foreign corporation engaged exclusively in interstate commerce, for the privilege of maintaining a means of such commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I, Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(3) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax upon a foreign corporation engaged exclusively in inter-

state commerce, and construed as in substance a tax on credits arising exclusively in said interstate commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I of Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a [fol. 101½] regulation thereof.

(4) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax upon a foreign corporation engaged exclusively in interstate commerce, and construed to be imposed in part upon income derived exclusively from interstate commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I, Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(5) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law, in that said statute imposes a tax on income of the business and sales made outside the said Commonwealth, and upon property located without said Commonwealth.

(6) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations construed to in- [fol. 102] clude as assets in Massachusetts and subject to tax therein credits belonging to a foreign corporation exclusively engaged in interstate commerce, said credits arising exclusively from said interstate commerce, and also other intangibles consisting of stock in other foreign corporations owning no property in Massachusetts and not doing any business therein, and as so construed as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law.

(7) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax on a portion of the income of a foreign corporation engaged exclusively in interstate commerce, said portion being determined largely by an allocation to Massachusetts of stock in other foreign corporations owning no property in Massachusetts and doing no business therein, and of other intangibles not located in or connected with Massachusetts, and as so construed as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Con-

stitution of the United States, as depriving the petitioner of its property without due process of law and denying the petitioner the [fol. 102½] equal protection of law.

For which errors the said plaintiff-in-error, the Alpha Portland Cement Company, prays that the judgment of the said Supreme Judicial Court for the Commonwealth of Massachusetts be reversed, and judgment entered for the plaintiff-in-error, and for costs.

Alpha Portland Cement Company, by Louis H. Porter, F. Carroll Taylor, John G. Palfrey, its Solicitors.

[fols. 103 & 104] Bond on Writ of Error for $500—Approved and filed March 12, 1924; omitted in printing

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[fol. 105] Citation—In usual form, showing service on Alexander Lincoln; omitted in printing

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[fol. 106] In Supreme Judicial Court

Clerk's Certificate

I, John F. Cronin, Clerk of the Supreme Judicial Court within and for the County of Suffolk and Commonwealth of Massachusetts, do hereby certify that the papers hereto annexed are an exemplification of the record in the case of Alpha Portland Cement Co., Petitioner, vs. Commonwealth of Massachusetts, Respondent, in said Supreme Judicial Court determined; and attached thereto, and transmitted with said record, are a copy of the Opinion of the Supreme Judicial Court for the Commonwealth, attested by the Reporter of Decisions; a copy of the Application for Writ of Error; a copy of the Assignment of Errors; a copy of the Bond; and the original Citation with acceptance of service endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Boston this 14th day of March in the year of our Lord one thousand nine hundred and twenty-four.

John F. Cronin, Clerk. (Seal.)

[fol. 107] In Supreme Court of the United States

[Title omitted]

Stipulation as to Printing of Record—Filed April 17, 1924

It is hereby stipulated that the copy of the record of the first case between the parties hereto, State Court No. 35433, and Docket No. 402 of the October Term, 1923, of the Supreme Court of the United States, printed in full as an exhibit in the record herein in the State

Court at pages 32 to 85 inclusive, need not be printed in extenso in the record on the writ of error in the Supreme Court of the United States in this case; but that in place thereof there be printed the following statement, to wit:

"A complete copy of the record in the Supreme Court of the United States, Docket No. 402, October Term, 1923, Alpha Portland Cement Company, plaintiff-in-error, against Commonwealth of Massachusetts, defendant-in-error, was included in the record in the State Court; and as this case has been consolidated for hearing with Case 402, the said record is not here reprinted."

Dated March 31, 1924.

Louis H. Porter, Counsel for Plaintiff-in-Error. Alexander Lincoln, Assistant Attorney General.

[fol. 108] [File endorsement omitted.]

Endorsed on cover: File No. 30,198. Massachusetts Supreme Judicial Court. Term No. 327. Alpha Portland Cement Company, plaintiff in error, vs. Commonwealth of Massachusetts. Filed March 17th, 1924. File No. 30,198.

FILE COPY

MAR 28 1924
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1923

No. ~~499~~ 103

ALPHA PORTLAND CEMENT COMPANY
Plaintiff-in-Error

against

COMMONWEALTH OF MASSACHUSETTS
Defendant-in-Error

October Term, 1923

No. ~~808~~ 327

ALPHA PORTLAND CEMENT COMPANY
Plaintiff-in-Error

against

COMMONWEALTH OF MASSACHUSETTS
Defendant-in-Error

MOTION TO CONSOLIDATE AND TO ADVANCE

LOUIS H. PORTER
F. CARROLL TAYLOR
JOHN G. PALFREY
Counsel for Plaintiff-in-Error

Appeal Printing Company, 22 Thames Street, New York City

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1923.

No. 402.

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff-in-Error,

against

COMMONWEALTH OF MASSACHUSETTS,
Defendant-in-Error.

OCTOBER TERM, A. D. 1923.

No. 888.

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff-in-Error,

against

COMMONWEALTH OF MASSACHUSETTS,
Defendant-in-Error.

MOTION TO CONSOLIDATE AND ADVANCE.

Now comes Alpha Portland Cement Company, the plaintiff-in-error, and moves this Court

(1) that these two causes be consolidated and heard together, and

(2) that these causes be advanced on the docket and set down for hearing upon a day certain.

STATEMENT OF FACTS.

The writs of error in these cases were brought to review the final judgments of the Supreme Judicial Court of the Commonwealth of Massachusetts dismissing the petitions of plaintiff-in-error. The actions were brought by a foreign corporation to recover taxes assessed against it for the years 1921 and 1922, respectively, on the ground that said taxes were illegally assessed. The actions were brought under the provisions of the Massachusetts statutes. No technical question of practice is involved. The sole question is whether the Massachusetts statute, construed to be applicable to the plaintiff-in-error, is repugnant to the Federal Constitution.

Case 402 was brought to recover the tax paid for the year 1921. Case 888 was brought to recover the tax paid for the year 1922. In both cases the facts were stipulated. The same constitutional questions are raised in this court in both cases.

In case 402 the details of the method of assessment were not shown, and it was stipulated that the amount of the tax was not in dispute. In view of the opinion of the State Court in that case, plaintiff apprehended that it might be contended that the State Court had not in all respects directly construed the statute, and that the condensed, agreed statement of facts left certain ambiguities open.

Case 888 was, therefore, brought, the State Court saying in its opinion:

> "The purpose of bringing the present petition respecting the excise levied for the year succeeding that under investigation in the earlier case apparently is to make certain the view of this court as to

points thought by the petitioner not to have been fully developed there, in order that the Supreme Court of the United States on writs of review may have before it all aspects of the statute."

Case 888 is, therefore, merely an amplification of case 402, and plaintiff-in-error submits that the two cases should be consolidated and heard together.

The agreed facts, briefly, are as follows:

The taxes were imposed under Chapter 63 of the General Laws of Massachusetts, first enacted as Chapter 355 of the Statutes of 1919. This statute imposes an excise tax with respect to the carrying on of business by foreign corporations within the Commonwealth. The excise is measured by two factors:

(1) The value of the corporate excess employed in the Commonwealth, taxed at the rate of five dollars a thousand. Corporate excess is defined as that proportion of the corporation's capital stock that its assets employed in business in Massachusetts bear to its total assets.

(2) A tax at the rate of two and one-half per cent. (2½%) on that portion of the corporation's net income derived from business within the Commonwealth. The proportion is based upon a complicated statutory formula, which involves the relation of tangible assets within and without the state, of salaries and wages paid to employees within and without the state, and of gross sales from the Massachusetts office as compared with gross sales elsewhere.

Plaintiff is engaged in the manufacture and sale of cement, having mills in various parts of the United States.

It has no mill and no store or warehouse in Massachusetts. So far as Massachusetts is concerned, its sole business is the sale in interstate commerce of cement manufactured in New York and Pennsylvania to residents of Massachusetts. It maintains a small sales office in Boston as a means of conducting this interstate commerce.

It is stipulated and expressly found by the State Court that the plaintiff is engaged exclusively in interstate commerce. It has no bank account in Massachusetts, and it is stipulated that its total property in that state consists of office furniture of the value of $573. In case 402 the total tax assessed was $800.06. This was divided—$420.01, tax on corporate excess, which was valued at $84,001.21; and $380.05, tax on net income apportioned to Massachusetts of $15,370. Of the latter amount, approximately eighty per cent. (80%), or $12,730.71, was based upon an allocation of gross sales from the Massachusetts office, $2,609.05 was based upon an allocation of wages to the salesmen making the sales in interstate commerce, and only $30.30 was based upon an allocation of tangible property in the State of Massachusetts.

The corporate excess was determined by allocating as assets engaged in business in Massachusetts, in addition to the tangible assets of $573, that proportion of the corporation's intangible assets that the income previously assigned to Massachusetts bore to the corporation's total income. A large part of the intangibles, of which a portion was thus allocated to Massachusetts, consisted of the stock of subsidiary corporations, holding title to real estate in Pennsylvania, where the Company's largest mills are situated.

The plaintiff-in-error contended that the State of Massachusetts could not constitutionally impose an excise tax

upon it for engaging in an exclusively interstate commerce business, or for maintaining in that state a sales office as a means of conducting such interstate business, and that, therefore, the entire tax was repugnant to the Commerce Clause of the Federal Constitution.

It also contended that aside from the question of classification of the tax, and that if it could be construed as in substance a tax on property, it was equally invalid, both because repugnant to the Commerce Clause and also because the tax was laid upon property and subjects outside the state's taxing jurisdiction, in contravention of the Fourteenth Amendment to the Federal Constitution.

It contended that it could lawfully be taxed by a proper tax on the value of its property in the state, stipulated to be $573, but that that was the only tax that the state could lawfully lay upon it.

The Massachusetts Supreme Judicial Court in both cases expressly recognized that the controversy could only be settled by the Supreme Court of the United States; but in elaborate opinions it sustained the tax as assessed and dismissed the complaints, and thus established the rule that foreign corporations selling goods in interstate commerce to residents of Massachusetts, and, so far as that state is concerned, engaged exclusively in interstate commerce, are subject to tax for the privilege of having a place of business in the state as a means of conducting such interstate commerce.

Under the rule as thus announced, the state is imposing this tax, not only on the plaintiff-in-error, but upon all other corporations similarly situated.

The questions involved, to be presented to the Court for its determination, are these: whether a foreign corporation engaged exclusively in interstate commerce, and

maintaining an office in Massachusetts solely as a means of conducting such commerce, is subject to tax by the State of Massachusetts for the privilege of maintaining that office, and, incidentally, if any tax at all can be imposed, whether the statutory formula does not inevitably impose a tax on property outside the state, in contravention of the Fourteenth Amendment to the Federal Constitution. It is the contention of the plaintiff-in-error that it is immune from any license or excise tax, and that any such tax is invalid under the Commerce Clause (*Cheney Bros.* v. *Mass.*, 246 U. S., 147).

These questions, directly affecting not only the administration of the state revenue, but still more the conduct of interstate commerce, are of grave importance; and we conceive it to be in the pubic interest that these cases should be advanced.

Dated March 21, 1924.

LOUIS H. PORTER,
F. CARROLL TAYLOR,
JOHN G. PALFREY,
Counsel for Plaintiff-in-Error.

To the Attorney-General of the State of Massachusetts:

Sir:

The within motion will be presented to the Court on April 7th, 1924, at the opening of court, or as soon thereafter as counsel can be heard.

Yours, etc.,

LOUIS H. PORTER,
F. CARROLL TAYLOR,
JOHN G. PALFREY,
Counsel for Plaintiff-in-Error.

Due service of the within notice of motion is hereby admitted.

ALEXANDER LINCOLN,
Assistant Attorney-General.

FILE COPY

No. 103 and No. 327

Supreme Court, U. S.
FILED
OCT 8 1924
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1924

ALPHA PORTLAND CEMENT COMPANY
Plaintiff-in-Error

against

COMMONWEALTH OF MASSACHUSETTS
Defendant-in-Error

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS

BRIEF AND ARGUMENT FOR PLAINTIFF-IN-ERROR

LOUIS H. PORTER
F. CARROLL TAYLOR
JOHN G. PALFREY
Counsel for Plaintiff-in-Error

Appeal Printing Company, 22 Thames Street, New York City

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IN THE

Supreme Court of the United States

October Term, A. D., 1924.

No. 103 and No. 327

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff-in-error,

against

COMMONWEALTH OF MASSACHUSETTS,
Defendant-in-error.

IN ERROR TO THE SUPREME JUDICIAL COURT OF THE STATE OF MASSACHUSETTS.

Statement of the Case.

CASE NO. 103.

This is a writ of error to review a final judgment of the Supreme Judicial Court of the State of Massachusetts finally dismissing the plaintiff's petition, and awarding a judgment with costs against it.

The action was brought for the abatement and recovery of a tax assessed for the year 1921 under the Massachusetts Corporation Tax Law, General Laws, Chapter 63 as amended by Chapter 493 of the Statutes of 1921, on the ground that the tax was illegally assessed, and that the statute construed as applicable to the plaintiff was repugnant to the Federal Constitution.

The plaintiff paid the tax under protest; and in due time brought this proceeding under Section 77 of Chapter 63, of the General Laws, for the recovery of the tax so paid. There is no technical question of practice involved. The sole question is whether or not the Statute

construed as applicable to the plaintiff is unconstitutional.

The Massachusetts statute here in question was originally passed as General Acts of 1919, Part I, Chapter 355. It was amended by Acts of 1920, Chapters 415 and 549. As thus amended it was incorporated in the revision of 1921 and is now known as G. L., Chap. 63, Secs. 30, *et seq.* The portions of the Statute considered relevant by the State Court are printed in the record as an appendix to the opinion of the State Court (Record, of case 103, pp. 31-40). The portions of the Act applicable to this case, excluding administrative provisions, are printed in the margin.* This Act took the place of the

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*"Section 39. Every foreign corporation shall pay annually with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one-twentieth of one per cent of such proportion of the fair cash value of all the shares constituting its capital stock as the assets, both real and personal, employed in any business within the commonwealth on April first following the close of the taxable year, bear to the total assets of the corporation employed in business on said date:

"(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

"(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth."

* * * * * * * * * *

Section 30, sub-div. 4. "'Corporate excess employed within the commonwealth' by a foreign corporation, such proportion of the fair value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date, less the value of the following:" (the exceptions are not applicable to this case).

"Section 41. The commissioner shall determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

"The following classes of income shall be allocated as follows:

(Subdivisions (a), (b), and (c) cover a specific allocation of gains from the sale of capital assets and from interest received in Massachusetts, which are not applicable to this case.)

"Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

"If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

1909 Act as amended considered in *Cheney Bros.* v. *Mass.*, 246 U. S., 147. Relevant portions of the 1909 Act are printed for reference as an appendix hereto.

The action was brought for the recovery of $800.45 paid by the plaintiff to the defendant's Commissioner of Corporations under protest, as an excise tax for the year 1921. This amount was assessed and collected from the plaintiff. The question presented by this writ of error is whether this statute, construed by the State Court to be applicable to the plaintiff, which was expressly found to be engaged solely in interstate commerce, is repugnant to the provisions of the Commerce

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"If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight."

The applicable part of Section 38 is as follows:

"2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

"(a) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

"(b) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employes.

"(c) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

"3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, the part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

"4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

"5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents

Clause and of the XIV Amendment to the Federal Constitution.

The facts are all stipulated, and are briefly as follows:

Plaintiff is a New Jersey corporation, engaged in the manufacture of cement. Its principal business office is located at Easton, Pennsylvania. Its mills are located in the States of New York, Pennsylvania, New Jersey, West Virginia, Ohio, Illinois, and Michigan. Cement manufactured at these mills is shipped therefrom to various points in the United States and foreign countries.

Its only office in Massachusetts is a small one in Boston, in charge of a district sales manager. He and other salesmen, under his direction, solicit orders throughout the New England states. When orders are obtained, they are recorded in the Boston office, and sent to the home office at Easton, Pennsylvania, for acceptance or rejection. No orders are ever accepted at the Boston office. When orders are accepted, the cement is shipped direct to the customer from the mills either in New York

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the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

"6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (b) rentals or royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation.

* * * * * * * * *

"9. A rule shall not be deemed to be inapplicable merely because all the tangible property of the expenditure of a corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth."

or Pennsylvania. Invoices are mailed direct to the customer from the home office in Easton, Pennsylvania, and payment is made direct by the customers to the Company at Easton, Pennsylvania (Case #103, p. 18).

No merchandise is kept in Massachusetts in sample form, or otherwise. None of the cement is produced or purchased in Massachusetts; all of it, so far as this case is concerned, being manufactured either in New York or Pennsylvania, and shipped from there direct to the customer. No shipment or sales are made from one point in Massachusetts to another point either within or without the State.

It is stipulated that its only property, real or personal, in the State is the office furniture valued at about Five Hundred Dollars. No bank account is kept in the State, salaries and rent being paid directly by checks mailed from Easton, Pennsylvania. No corporate meetings are held, no corporate records are kept in the State. No officers or agents have offices in the State, except the salesmen who travel from the Boston office (Case #103, p. 19).

It was conceded by the State, and expressly found by the State Court that the plaintiff was engaged in Mas-

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Remedies for collection of the tax are provided in Sections 72 to 75 included. Section 72 authorizes collection by distraint, Section 73 authorizes an action on contract and Section 74 makes certain lessees liable for taxes due from lessors. Section 75 is as follows:

> "In addition to the methods provided by Sections seventy-two and seventy-three, taxes under this chapter, except Section sixty-two, maybe collected by an information brought in the Supreme Judicial Court by the attorney general at the relation of the state treasurer. The Court may issue an injunction upon such information, restraining the further prosecution of the business of the company association or corporation until such taxes with interests and costs thereon have been paid; but no telegraph company accepting the provisions of Section fifty-two hundred and sixty-three of the revised statutes of the United States shall be enjoined from constructing, maintaining or operating a telegraph line over and along any of the military or post roads of the United States within this commonwealth."

Section 62 above referred to imposes a gross receipts tax on street railways and is not applicable to this case.

sachusetts exclusively in interstate commerce (Case #103, p. 24). Plaintiff filed a report with the Massachusetts Commissioner of Corporations under protest in the form prescribed by the Department. The report is reproduced in full in the record, and shows in brief the following items:

Issued capital stock.....	Common	15,799,100.00
	Preferred	2,000,000.00
Total gross assets.....		21,076,282.74
Tangible property in Massachusetts, Office furniture only		573.00
Real estate, machinery, merchandise, bank deposits, accounts receivable, patents, good-will, and all other intangible assets, representing the enumeration of all assets employed in business within Massachusetts		None.
Tangible assets employed outside of Massachusetts		12,498,626.06
Intangible assets employed outside of Massachusetts,—		
Bank deposits		121,726.54
Accounts receivable		652,313.31
Good-will		1,750,000.00
Other intangible assets employed outside of Massachusetts		6,053,616.83
(The last figure including an item of $4,500,000., value of stock of the Alpha Portland Cement Co. of Pennsylvania.)		
Securities held in Massachusetts.....		None
Total net income as returned for Federal income tax		$1,247,118.03
For the allocation of income, deducting interest from bonds and notes included in the Federal return, gave net income to be apportioned under the statute of.....		1,148,041.70
Total gross sales		12,774,825.05
Gross sales to Massachusetts customers..		424,982.70

(Case #103, p. 8)

In its return the plaintiff contended that the item of $4,500,000, value of the stock of its subsidiary corporation, should be considered as a tangible asset. Because of the restrictions on foreign corporations' holding real

estate in Pennsylvania, title to the Company's mills in that State is held through the medium of this subsidiary corporation. The parent company operates the mills, and receives all the income therefrom; and since the income was included as part of the total income subject to allocation under the statute, the Company contended that the stock, representing merely the physical property of these mills, should be considered as tangible property outside the State. The State Tax Department overruled this contention, which decision has been upheld by the State Court.

The total salaries paid to the New England salesmen who report to the Boston office are $17,780. The Company contended that if these salaries had any relation to the tax at all, it should be only to the extent of the salaries paid to men selling Massachusetts customers; and the Company therefore contended that the amount of salaries to be used in the statutory computation should be $11,023.60. The State Tax Department also overruled that contention (Case #103, p. 10).

This made slight increases in the amount of tax. The Department assessed the corporate excess of the petitioner at $84,001.21, taxable at five dollars per thousand, making a corporate excess tax of $420.01.

It determined net income assignable to Massachusetts business at $15,370, taxable at two and a half per cent., making a total income tax of $384.25, less five per cent. of the dividends paid to Massachusetts inhabitants, $4.20, making a net income tax of $380.05, and the total amount of tax due of $800.06. This amount was paid under protest, together with an additional nominal tax of 39c on net income imposed under Chapter 493 of the Acts of 1921 (Case #103, p. 14).

The complaint alleged that the tax assessed against the plaintiff was illegal and void, because in contravention of the Commerce Clause, of Section 8 of Article I of the Constitution, and also because it deprived the plaintiff of its property without due process of law in contravention of the XIV Amendment of the Constitu-

tion; and drew in question the validity of the statute under which the tax was imposed upon the ground that construed as applicable to the plaintiff, the statute was unconstitutional for these reasons (Case #103, p. 6).

The State Court found that the plaintiff was engaged solely in interstate commerce, and maintained an office in Massachusetts solely as a means of conducting said commerce. It nevertheless construed the statute to be applicable to the plaintiff, upheld the validity of the statute as so construed, sustained the tax, and dismissed the complaint. While expressly recognizing that the constitutional question involved must finally be passed upon by this Court, it rendered final judgment against the plaintiff (Opinion, Case #103, p. 22).

CASE No. 327.

In case No. 103 the method of assessment whereby corporate excess was valued at $84,001.21, although property in the State was stipulated to be only $573, was not shown. In view of the stipulation that the amount of the tax was not in dispute, there was a doubt whether the State Court had directly construed the statute to require such a valuation of corporate excess.

Case No. 327 was accordingly brought as to the 1922 tax to remove any possible ambiguity as to the State Court's construction of the statute, and, as that Court said in its opinion in the later case, "to make certain the view of this Court as to points thought by the petitioner not to have been fully developed there, in order that the Supreme Court of the United States on writ of review may have before it all aspects of the statute" (Case #327, fol. 94).

Aside from the natural variation of figures between the two years, the essential difference of this case from 103 is (1) a full statement of the method of assessing corporate excess, and (2) instead of the stipulation that the amount of the tax is not in dispute, in this case the stipulation is that the mathematical computations are correct, and the valuation of specific items of assets fair.

Corporate excess was assessed under the general departmental rule that to the value of tangible property in the state should be added such a proportion of the total intangible property of the corporation, as the income assigned to Massachusetts under the statutory formula bore to the total income. The sum of these was assumed to represent assets engaged in business in Massachusetts (Case #327, fols. 31, 32).

The report upon which the tax was assessed showed the following items:

Issued capital stock.....	Common	$15,799,100.00
	Preferred	2,000,000.00
Total gross assets.....		21,406,098.39
Tangible property in Massachusetts, Office furniture only.....		573.00
Real estate, machinery, merchandise, bank deposits, accounts receivable, patents, good-will, and all other intangible assets representing the enumeration of all assets employed in business in Massachusetts		None
Tangible assets employed outside Massachusetts		13,744,008.18
Intangible assets employed outside of Massachusetts:		
Bank deposits		113,642.04
Accounts receivable		713,827.94
Good-will		1,750,000.00
Other intangible assets employed outside Massachusetts		5,084,620.23
(The last figure including an item of $4,500.00, value of stock of Alpha Portland Cement Co. of Pennsylvania.)		
No goods were held in Massachusetts.		
Total net income as returned for Federal income tax		730,159.16
For the allocation of income, deducting interest from bonds and notes included in the Federal return, gave net income to be apportioned under the statute of....		707,577.98
Total gross sales.....		10,717,546.43
Gross sales to Massachusetts customers..		343,204.60

(Case #327, fols. 10-16).

For some reason, unexplained of record, but said to have been inadvertence, the plaintiff's contention that the stock in the Pennsylvania subsidiary should be considered a tangible asset, was followed in assessing that portion of the tax measured by net income. The assessment was made as follows:

(1) The tax measured by net income.

Average value of tangible property in Mass. / Average value of all tangible property		$573. / 16,992,355.22	
	× 1/3	(707,577.99)=	8.02
Wages, salaries, etc. assignable to Mass. / Total wages, salaries, etc.		$11,493.38 / 1,650,614.73	
	× 1/3	(707,577.99)=	1642.29
Gross receipts assignable to Mass. / Gross receipts from all business		$343,204.60 / 10,717,546.43	
	× 1/3	(707,577.99)=	7552.22
Total			9202.53 (Case #327, fol. 24)
Net income $9202.53 taxable at 2½%		$230.06	
Less 5% of dividends paid Massachusetts inhabitants		42.15	
Total income tax (Case #327, fol. 24)			$187.91

(2) The tax on corporate excess.

Income assigned to Massachusetts as above $9,203, divided by total apportionable net income, $707,578, multiplied by total intangible assets, as shown in report and as given above, $7,602,090.21 (inadvertently taken as the total instead of $7,662,090.21) equals $98,827.17, intangible assets assigned to Massachusetts. Adding tangible assets of $573, gave $99,400 as the assessed value of "assets of the petitioner employed in business in Massachusetts."

The cash value of all the shares of the Company's capital stock was determined to be $16,352,162. The assessment of corporate excess was therefore:

$$\frac{99400 \text{ (Value Mass. assets)}}{21,406,098 \text{ (Value total assets)}} \times 16,352,162 = \$75,932.08.$$

(Case #327, fols. 32, 33)

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The tax on corporate excess $5 a thousand, amounted to $379.66.

The legality of this assessment was directly attacked, both upon the ground that it was unconstitutional, and also on the ground that it was not in conformity with the provisions of the statute. In its opinion sustaining the tax and dismissing the complaint, the State Supreme Court said:

> "Without pursuing the details of the method of computation to ascertain these two elements, it is enough to say that it is in conformity to the statute" (Case #327, fol. 95).

This writ of error was therefore brought to review the final judgment of the Supreme Judicial Court of Massachusetts dismissing the complaint. The same questions are involved as in Case No. 103, and need not be repeated here.

Specification of Errors.

CASE NO. 103.

1. The Court erred in holding that the provisions of the Massachusetts excise tax on foreign corporations, as contained in Chapter 63 of the General Laws of the Commonwealth of Massachusetts and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Acts of 1921, as applied to the plaintiff-in-error, were constitutional, and not in violation of the provisions of the Commerce Clause contained in Section 8, Article I of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to the regulation thereof.

2. The Court erred in holding that the provisions of the said Massachusetts excise tax on foreign corporations, as contained in Chapter 63 of the General Laws of the Commonwealth of Massachusetts, and the

acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Acts of 1921, as applied to the plaintiff-in-error, are constitutional, and not in conflict with and in violation of the provisions of the XIV Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law, in that said statute imposes a tax on income of the business and sales made outside of the said Commonwealth, and upon property located without said Commonwealth (Case #103, pp. 41, 42).

CASE No. 327.

(1) The Massachusetts Supreme Judicial Court erred in holding that the provisions of the Massachusetts Excise Tax on foreign corporations, as contained in Chapter 63 of the General Laws of the Commonwealth of Massachusetts, and the acts in amendment thereof and in addition thereto, and Chapter 361 and Chapter 493 of the Massachusetts Act of 1921, as applied to the plaintiff-in-error were constitutional and not in violation of the provisions of the Commerce Clause contained in Section VIII, Article I of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(2) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose an excise tax upon a foreign corporation engaged exclusively in interstate commerce, for the provilege of maintaining a means of such commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I, Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(3) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax upon a foreign corporation engaged exclusively in interstate commerce, and construed as in substance a tax on credits arising exclusively in said interstate commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I of Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(4) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax upon a foreign corporation engaged exclusively in interstate commerce, and construed to be imposed in part upon income derived exclusively from interstate commerce, and as so construed as applied to the plaintiff-in-error, were constitutional and were not in violation of the provisions of the Commerce Clause contained in Article I, Section VIII of the Constitution of the United States, as placing a burden or tax on interstate commerce equivalent to a regulation thereof.

(5) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law, in that said statute imposes a tax on income of the business and sales made outside the said Commonwealth, and upon property located without said Commonwealth.

(6) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, contrued to include as assets in Massachusetts and subject to tax therein credits belonging to a foreign corporation exclusively engaged in interstate commerce, said credits arising exclusively from said interstate commerce, and also other intangibles consisting of stock in other foreign corporations owning no property in Massachusetts and not doing any business therein, and as so construed as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law, and denying the petitioner the equal protection of law.

(7) The Court erred in holding that the provisions of the said Massachusetts Excise Tax on foreign corporations, construed to impose a tax on a portion of the income of a foreign corporation engaged exclusively in interstate commerce, said portion being determined largely by an allocation to Massachusetts of stock in other foreign corporations owning no property in Massachusetts and doing no business therein, and of other intangibles not located in or connected with Massachusetts, and as so construed as applied to the plaintiff-in-error, are constitutional and not in conflict with and in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States, as depriving the petitioner of its property without due process of law and denying the petitioner the equal protection of law (Case #327, fols. 100-103).

SUMMARY OF POINTS.

I.

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THE CONSTITUTIONALITY OF THE MASSACHUSETTS STATUTE IS DRAWN IN QUESTION, THE DECISION OF THE HIGHEST COURT IN THE STATE IS IN FAVOR OF ITS VALIDITY, AND THE PLAINTIFF HAS PROPERLY BROUGHT THESE WRITS OF ERROR TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 23

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S., 282 .....

II.

PLAINTIFF'S SOLE BUSINESS, SO FAR AS IT TOUCHES THE STATE OF MASSACHUSETTS, IS INTERSTATE COMMERCE 24

III.

THE TAX HERE IN QUESTION IS AN EXCISE UPON THE DOING OF INTERSTATE COMMERCE, AMOUNTING TO A REGULATION AND DIRECT BURDEN THEREON, AND IS REPUGNANT TO THE COMMERCE CLAUSE, SECTION 8, ARTICLE 1 OF THE CONSTITUTION..... 25

(a) The possible subjects of taxation are persons, property and business.

State Tax on Foreign Held Bonds, 15 Wall., 300 25

(b) The tax here in question is obviously not a tax on persons, and, if so construed, would be invalid when attempted to be imposed on a foreign corporation.

United States v. *Erie Ry. Co.*, 106 U. S., 327..
Dewey v. *Des Moines*, 173 U. S., 193.....
City of New York v. *McLean*, 170 N. Y., 374.. 25

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(c) This tax, construed as applicable to the plaintiff, is an excise on the doing of interstate business, and is not a property tax. It was expressly so construed by the State Court in Case 103 (Record, p. 25), and in 26

Judson Freight Forwarding Co. v. *Commonwealth*, 242 Mass., 47, 51.....

If construed as a property tax, it would be invalid under the Massachusetts State Constitution because not proportional 28

Opinion of the Justices, 220 Mass., 613....
S. S. White Dental Mfg. Co. v. *Commonwealth*, 212 Mass., 35 .....

(d) An excise imposed by a state on the doing of interstate commerce is invalid because repugnant to the Commerce Clause of the Constitution 31

Cheney Bros. v. *Massachusetts*, 246 U. S., 147
State Freight Tax, 15 Wall., 232, 272.....
Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S., 282 .....
Crutcher v. *Kentucky*, 141 U. S., 47.....
Kansas City Ry. v. *Kansas*, 240 U. S., 227, 231
McCall v. *California*, 136 U. S., 104.....
Norfolk & Western Rd. Co. v. *Pennsylvania*, 136 U. S., 114 .....
Crenshaw v. *Arkansas*, 227 U. S., 389.....
The Texas Transport & Terminal Co. v. *New Orleans*, 264 U. S., 150 .....

IV.

THE TAX IS NOT IN SUBSTANCE A TAX ON PROPERTY 38

(a) This Court is bound by the construction of the State Court that it *was not* a tax on property, but *was* an excise on the doing of business.

Ward & Gow v. *Krinsky*, 259 U. S., 503.....
Northern Pacific Rd. v. *Meese*, 239 U. S., 614
Brown v. *Kentucky*, 217 U. S., 563.....
Price v. *Illinois*, 238 U. S., 446.....
Farncomb v. *Denver*, 252 U. S., 7 38

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(b) Upon the facts of record in these cases, figures from No. 103 being used, the tax is clearly not in substance a tax on property.

The tax is divided into two parts—(1) a direct income tax upon that portion of the total income that is attributed to Massachusetts; (2) measured by what is termed corporate excess.

(1) The tax on income.

This was levied under an express statutory formula. This provides an apportionment based upon three factors:

(a) The proportion of tangible property within the State compared with total tangible property, this attributing income to Massachusetts of ..... $ 30.30 39

(b) The proportion of wages and salaries of employes connected with or reporting to the Massachusetts office compared with total wages and salaries paid, this attributing income to Massachusetts of..... 2,609.05 40

(c) The proportion of gross receipts of sales made through the Massachusetts office or by employes sent out therefrom to the total gross receipts from all sales, this attributing income to Massachusetts of 12,730.71 42

Less than 1% of the income thus attributed to Massachusetts has any relation to property. The balance relates solely to plaintiff's interstate business.

The tax on income was $380.05, which obviously was not a tax on property stipulated to be worth about $500.

(2) The tax on corporate excess 45

Corporate excess is defined to be that portion of the fair value of the capital stock that the assets employed in business in Massachusetts bear to total assets.

But assets employed in business in Massachusetts have been construed to mean

(a) Tangible assets valued in this case at $573.

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(b) Intangible assets of $114,837 assigned a situs in Massachusetts as representing in substance an assessment of credits arising in interstate commerce and the franchise of doing interstate commerce.

The tax on corporate excess was $420.01, which obviously was not in substance a tax on property stipulated to be worth about $500.

It is apparent that under this construction of the statute the assessment of corporate excess has no more relation to property in the state which is subject to property taxation than has the tax on income.

They are both taxes on interstate commerce and not on property.

V.

IF THAT PORTION OF THE TAX MEASURED BY "CORPORATE EXCESS" CAN BE CONSTRUED TO BE IN SUBSTANCE A TAX ON PROPERTY, IT IS INVALID BECAUSE IN CONFLICT WITH THE COMMERCE CLAUSE AND THE XIV AMENDMENT TO THE CONSTITUTION

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Plaintiff concedes that its tangible property in the state can lawfully be taxed. But this is negligible in amount, and this tax is concededly not on it.

(a) The tax is in conflict with the Commerce Clause of the Constitution 50

(1) Viewed as in substance a tax on property, a portion of the property taxed is, as the State Court said, "the credits due it from debtors within this Commonwealth."

While credits arising from the conduct of a local business have sometimes been given a situs at the residence of the debtor, this has never been held as to credits arising exclusively from interstate commerce. Furthermore such credits in interstate commerce are not taxable *subjects*. They are essentially the commerce itself and share its immunity from state taxation.

Crew Levick Co. v. *Pennsylvania*, 245 U. S., 292 .....

Champlain Realty Co. v. *Town of Battleboro*, 260 U. S., 366 .....

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S., 282 .....

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Coe v. *Errol*, 116 U. S., 517.....
Bacon v. *Illinois*, 227 U. S., 504.....
Sonneborn Bros. v. *Cureton*, 262 U. S., 506..
Oliver Iron Mining Co. v. *Lord*, 262 U. S., 172
Burke v. *Wells*, 208 U. S., 14.....
Phila. & Southern S. S. Co. v. *Penn.*, 122 U. S., 326 .....
Pullman Co. v. *Richardson*, 261 U. S., 330....

(2) Characterizing the tax as in substance one on property, the remaining portion of the property taxed was said by the State Court to be "the exercise of its franchise within this Commonwealth."

But it is agreed that the only franchise used in the State is the franchise of engaging in interstate commerce, and that cannot be taxed by the State. The franchise to do business as a corporation is granted, not by Massachusetts, but by New Jersey.

None of the cases relied upon by the State Court in which a tax, in form on the franchise of a corporation engaged in interstate commerce, has been sustained, are applicable. In every such case the tax was sustained because it was found to be either

(a) in substance a tax on property subject to the State's taxing jurisdiction, and only in form on the franchise,

Western Union Tel. Co. v. *Mass.*, 125 U. S., 530 .....
Pullman Car Co. v. *Penn.*, 141 U. S., 18.....
Pullman Co. v. *Richardson*, 261 U. S., 330..
U. S. Express Co. v. *Minnesota*, 223 U. S., 335
Erie Rd. Co. v. *Pennsylvania*, 158 U. S., 431..
Western Union Tel. Co. v. *Taggart*, 163 U. S., 1 .....
Western Union Tel. Co. v. *Gottlieb*, 190 U. S., 412 .....

or

(b) a franchise tax upon a domestic corporation where the State taxed the privilege which it itself granted.

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Delaware Railroad Tax, 18 Wall., 206.....
Central Pacific Co. v. *California*, 162 U. S., 91 .....
Atlantic Tel. Co. v. *Philadelphia*, 190 U. S., 160 .....

(b) The tax is in conflict with the XIV Amendment 67

More than 99% of the "corporate excess" as assessed represented apportionment of intangibles. These intangibles were in Case 103

Bank deposits outside Massachusetts	**$ 121,726**
Accounts receivable	**652,313**
Good-will	**1,750,000**
Stock, Alpha Portland Cement Co. of Pa.	**4,500,000**
Other securities held outside Mass.	**1,553,616**
Total	**$8,577,655**

The Alpha Portland Cement Co. of Pennsylvania is a subsidiary company holding title to the Company's mills in Pennsylvania, and having no property in any other State. The indirect inclusion of any part of the stock of this Company, or of other securities held without the State, as taxable property in a foreign State, has been held to deprive the Company of its property without due process of law.

Peo. ex rel. Alpha Portland Cement Co. v. *Knapp*, 230 N. Y., 48. Rehearing denied, 231 N. Y., 516. Certiorari denied, 256 U. S., 702 .....

While specific property may have a greater value as a part of a going concern than considered alone, and while in assessing such property a State may properly take into account such increased value, it cannot through the form of such valuation in substance tax property situated without its borders.

Wallace v. *Hines*, 253 U. S., 66.....
Oklahoma v. *Wells, Fargo & Co.*, 223 U. S., 298 .....

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The assessment of plaintiff's "corporate excess" based chiefly upon an apportionment of intangible property not having a situs in Massachusetts, was in substance an assessment of property without the taxing jurisdiction of the State.

VI.

THE PART OF THE TAX MEASURED BY NET INCOME IS INVALID BECAUSE THE SUBJECT TAXED IS NOT ONE WHICH THE STATE HAS JURISDICTION TO TAX 73

As to this, the State Court found it was "dependent upon net profits derived solely from interstate commerce" (Record Case 103, p. 27).

It has been held that a state can levy an income tax on a resident over whom it has personal jurisdiction, and can measure that tax by the entire net income, although a considerable part is derived from interstate commerce or from export, that is, from a source which the state has no jurisdiction to tax.

Peck v. *Lowe*, 247 U. S., 165.....
U. S. Glue Co. v. *Oak Creek*, 247 U. S., 321....

But here the plaintiff is not a citizen or resident of Massachusetts, and there is no personal jurisdiction.

It has been held that a state can levy an income tax on a nonresident over whom it has no personal jurisdiction, and can measure that tax by that part of the net income which is derived from a source which the state has jurisdiction to tax.

The Yale & Towne Mfg. Co. v. *Travis*, 252 U. S., 60 .....
Shaffer v. *Carter*, 252 U. S., 37.....

But here the sole source of the income is interstate commerce, which the state has no jurisdiction to tax.

It has not been held

(a) That a tax is valid when levied with complete absence of jurisdiction over the subject taxed because it is measured by net income.

(b) That the fact that a tax is measured by net income gives a state the power to tax the subject of interstate commerce.

(c) That jurisdiction over the subject taxed is not as essential in the case of a tax measured by net income, as in the case of a tax measured in any other way.

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The State Court has overlooked the vital difference between the subject taxed and the measure of a tax.

Flint v. *Stone Tracy*, 220 U. S., 107.....

In every valid tax there must be jurisdiction over the subject taxed, which in the case of an income tax means either (1) *personal* over the taxpayer as the recipient of the income, or (2) *in rem* over the source of the income.

Here the tax must fail for absence of jurisdiction over any taxable subject.

ARGUMENT.

POINT I.

The constitutionality of the Massachusetts statute is drawn in question, the decision of the highest court in the State is in favor of its validity, and the plaintiff has properly brought these writs of error to the Supreme Judicial Court of the Commonwealth of Massachusetts.

In each case plaintiff, having been assessed a tax under Chapter 63 of the General Laws of Massachusetts and the acts in amendment thereof, and of Chapters 361 and 493 of the Massachusetts Acts of 1921, paid the tax under protest, and brought suit under the Massachusetts statutes to recover it back, alleging that the laws under which the tax was assessed were unconstitutional, in that they imposed a tax upon interstate commerce, and were therefore repugnant to the Commerce Clause, Sec. 8, Art. I of the Constitution; and also imposed a tax upon plaintiff's property outside the State of Massachusetts, and without its taxing jurisdiction, and therefore deprived plaintiff of its property without due process of law, and was repugnant to the Fourteenth Amendment to the Constitution.

The Supreme Judicial Court of Massachusetts, which is the highest court of the State, construed these laws as applicable to the plaintiff; and while expressly recognizing that the question of the constitutionality of the law must be decided by this Court, decided in favor of the constitutionality of the laws drawn in question, sustained the tax, and dismissed the suits.

Since the constitutionality of the laws construed by the State Court as applicable to the plaintiff has been directly drawn in question in the plaintiff's petitions in

the State Court, and since the question of constitutionality was considered and passed upon by the highest court of the State, and the decisions were in favor of the validity of the law and of its applicability to the plaintiff, the plaintiff's contentions in this respect are properly here on writs of error.

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U. S., 282.

POINT II.

Plaintiff's sole business, so far as it touches the State of Massachusetts, is interstate commerce.

The facts as to this are not in dispute. Plaintiff is a New Jersey corporation. So far as its business touches Massachusetts, it is engaged solely in interstate commerce. It does no local or intrastate business. It maintains a small sales office solely as a means of conducting its interstate business. The facts are stipulated fully in the record, and are concisely reviewed in the opening statement (*supra*, pp. 4, 5).

On the agreed state of facts the State Court held

> "It is rightly conceded by the Attorney General that the petitioner was engaged in this Commonwealth exclusively in interstate commerce," (Record, Case 103, p. 24).

The State Court stated the issue before it on this finding as follows:

> "The question to be decided is whether a foreign corporation having a usual place of business in this Commonwealth used for interstate commerce alone is subject to taxation under the tax law" (Record, Case 103, p. 24).

POINT III.

The tax here in question is an excise upon the doing of interstate commerce, amounting to a regulation and direct burden thereon, and is repugnant to the commerce clause, Section 8, Article I of the Constitution.

In *State Tax on Foreign Held Bonds,* 15 Wall., 300, this court defined the possible subjects of taxation:

> "These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways" (p. 319).

And an income tax affords no exception to this all-inclusive definition, which has frequently been cited by this Court with approval. An income tax may be a tax upon the recipient of the income, that is, a tax on persons, or it may be a tax upon the source of the income, that is, a tax on property or business. In either case, the income serves as a measure of the tax, but cannot itself be the subject of the tax. The income is a mere attribute, either of the owner of the income, or of the source from which it is derived, and can have no real existence apart from its subject. The tax here in question, therefore, considered with reference to the subject taxed, must either be a tax on persons, or a tax on property, or a tax on business.

It is obvious that the tax is not a tax on persons, and would be invalid if it should be so construed. The plaintiff is a New Jersey corporation, foreign to the Commonwealth of Massachusetts; and the Common-

wealth has no jurisdiction over it. That a State cannot constitutionally impose a personal tax on a non-resident is well settled.

> *U. S.* v. *Erie Railway Co.*, 106 U. S., 327;
> *Dewey* v. *Des Moines*, 173 U. S., 193;
> *City of New York* v. *McLean*, 170 N. Y., 374;
> *Wilcox* v. *City of Rochester*, 129 N. Y., 247;
> *Maltbie* v. *Lobsitz Mills Co.*, 223 N. Y., 227;
> *Barhyte* v. *Shepherd*, 35 N. Y., 237;
> *Cooley on Taxation*, 3rd Edition, page 24;
> *Brown, Jurisdiction of Courts*, 2d Edition, pp. 549-550;
> *State* v. *Ross*, 23 N. J. L., 517.

This limitation on the power of the State to impose a personal tax upon the plaintiff was apparently recognized by the State Court. At any rate, its opinion contains no suggestion that the tax here in question should be construed as a personal tax.

It follows that the tax must either be one on property or on business. Plaintiff contends that it is a tax on business, and in this point we consider the affirmative reasons for this contention, and in the following point we shall consider and attempt to show that the tax cannot be considered as one on property.

Section 39 of Chapter 63 of the General Laws imposing this tax, provides:

> "Every foreign corporation shall pay annually with respect to the carrying on or doing of business by it within the Commonwealth an excise equal to the sum of the following,"

and then follows the measure of the excise tax thus imposed for the privilege of doing business. The State Court has directly held that this tax is a tax upon business, and is not a property tax. The opinion sustaining the tax here in question says:

> "This tax law, placing as it does both domestic and foreign corporations on common ground as to taxation except so far as essential differences require different treatment in details, follows the policy established in this Commonwealth for many years of levying an excise instead of a property tax on corporate franchises and corporate transaction of business. *Eaton, Crane & Pike Co.* v. *Commonwealth*, 237 Mass., 523. • • • The present tax act imposes the excise with respect to the carrying on of business by foreign corporations within the Commonwealth. It is an excise for the privilege of having a place of business under the protection of our laws and with the financial, commercial and other advantages flowing therefrom measured solely by the property and net income fairly attributable to the business done here by a foreign corporation. The excise is measured by two factors,—(1) the value of the corporate excess employed within the commonwealth, and (2) the net income derived from business within the commonwealth" (Record, Case 103, pp. 23, 25).

The court thus followed its earlier decision as to the subject here taxed announced in

> *Judson Freight Forwarding Co.* v. *Commonwealth*, 242 Mass., 47, 51.

wherein it was said:

> "This tax in its nature is an excise and not a property tax. It is named an 'excise' in the statute. The declared purpose of the Legislature is accepted unless inconsistent with the meaning and effect of the enactment. *S. S. White Dental Manufacturing Company* v. *Commonwealth*, 212 Mass., 35, 40. It is levied 'in respect to the carrying on or doing of business by it within the Commonwealth.' It is an excise for the commodity or privilege of having a place of business in Massachusetts with the protection of our laws

> and the financial, commercial and other advantages appertaining thereto. *Attorney General* v. *Electric Storage Battery Co.*, 188 Mass., 239, 240."

An analysis of the tax under the statutes in question makes clear the fundamental characteristics of the tax in its relations with the system of taxation established by the Constitution of Massachusetts. It shows that this tax is in substance, as well as in form, not a property tax, but an excise on the doing of business, and that the decision of the State Court to this effect is a binding construction and interpretation of the statute, and not a mere characterization thereof.

The Constitution of Massachusetts, Chapter I, Section I, Article 4, empowers the general Court

> "to impose and levy proportional and reasonable assessments, rates, and taxes upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth; and also to impose and levy reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever, brought into, produced, manufactured, or being within the same."

As the Supreme Court of Massachusetts has said in *Opinion of the Justices*, 220 Mass., 613, 618:

> "These words contain the entire grant to tax. They comprehend two general powers, one to lay assessments, rates and taxes upon persons and property, the other to impose duties or excises upon commodities. These two branches of the taxing power are clearly separated. They are different in kind and are expressed in different terms. The power to tax, which includes the power to levy assessments, rates and taxes, relates to persons and property. The power in this respect is not boundless. It is restricted to the extent that it must be 'proportional and reasonable.' These are words of limitation. Cap-

itation and property taxes must be levied in conformity to this limitation. The significant word in the present connection is 'proportional.' A general property tax, in order to be proportional, must be divided so that the amount to be raised shall be shared by the taxpayers according to the taxable real and personal estate of each. A tax for local improvement must be apportioned according to the benefit accruing to the several estates from the public expenditure. While the power to tax includes all persons and all estates within the Commonwealth, and this is most comprehensive, at the same time the restriction to the effect that all taxes must be 'proportional' is equally extensive. On the other hand an excise, including thereby both duties and excises, is of a different character. It need not be based on any rule of proportion. It must only be 'reasonable.' It is a fixed and absolute charge upon the element selected, without reference to the amount of property or the benefit of the taxpayer."

While this case was decided before the adoption of the 44th amendment to the State Constitution, which authorizes the General Court to impose a general income tax, that amendment did not affect the questions discussed in the foregoing quotation, nor the question involved in this case of whether under the State Constitution the tax here in question can be considered as a property tax.

A grant of power to impose and levy excises upon commodities has been from the earliest days the basis of the taxation of corporations in Massachusetts, both foreign and domestic. In the case of foreign corporations, the commodity upon which the tax is imposed is the privilege of doing business within the Commonwealth, and an excise upon this privilege as a commodity has been justified by reason of the power of the state to withhold its sanction. Upon this basis taxes have been

imposed which could be sustained upon no other ground under the Massachusets Constitution.

S. S. White Dental Mfg. Co. v. *Commonwealth,* 212 Mass., 35;
Attorney General v. *Electic Storage Battery Co.,* 188 Mass., 239;
Attorney General v. *Bay State Mining Co.,* 99 Mass., 148.

In this respect the position of a corporation under the Massachusetts Constitution differs widely from that of an individual, as to whom the power of the Legislature to impose an excise with respect to the privilege or commodity of engaging in a business, which is a natural right, has been the subject of much difference of opinion.

Opinion of the Justices, 196 Mass., 603;
Minot v. *Winthrop,* 162 Mass., 113;
Gleason v. *McKay,* 134 Mass., 419.

The Constitution of Massachusetts and the decisions of the Massachusetts Supreme Court have made it abundantly clear precisely what the tax on foreign corporations is, and equally clear what it is not. The tax is not a property tax, nor an income tax. It is not a tax on the franchise as property, because it is not a property tax at all. Neither is it an excise on the right to exist and function as a corporation, for that is a right conferred by the law of a foreign State, and is not a commodity subject to an excise under the Constitution of Massachusetts.

Attorney General v. *Bay State Mining Co.,* 99 Mass., 148, 152.

The tax is purely and simply an excise based upon the privilege of engaging in business within the State of Massachusetts, and of maintaining as a means thereof a place of business therein. The decision to this effect by the State Court in this case is correct, and this Court has often held that on the question of the construction of a State statute, it is concluded by the decision of the State Court (*infra*, p. 38).

It is conceded by the State, and was expressly found by the State Court, and correctly found, as we have shown *supra*, Point II, that the plaintiff's sole business in Massachusetts is the doing of interstate commerce; and plaintiff therefore submits that it necessarily follows that this tax is an excise imposed upon the plaintiff for the privilege of engaging in the business of interstate commerce. So construed, the tax is clearly unconstitutional and void as repugnant to the Commerce Clause of Section 8, Article I of the Constitution of the United States. It was held by this Court in

Cheney Bros. Co. v. *Massachusetts*, 246 U. S., 147,

that an excise tax imposed under the Massachusetts statute of 1909, Chapter 490, upon a foreign corporation engaged solely in interstate commerce was void as repugnant to the commerce clause. The subject sought to be taxed in the 1909 excise and in the present act is the same,—namely, the privilege of doing business in the Commonwealth. This Court held in the *Cheney Bros.* case that where that business was solely interstate commerce, it was not subject to a state excise tax. The Legislature in both cases applied the tax to the same class of corporations. The difference is solely in the measure of the tax. The excise under the 1909 statute

was measured by the amount of capital stock, with a maximum of $2,000. The present statute measures the excise by a combination of two percentages,—one based on the proportion of its property attributable to Massachusetts business, and the other on the proportion of its net income attributable to Massachusetts business.

The State Court held that the present law "differs in its essential characteristics" from the earlier laws of 1903 and 1909. But as clearly appears from the court's opinion, as well as from a reading of the statutes, (present statute Record, Case 103, pp. 31-40, earlier statute printed as an appendix to this brief), the differences are not in the nature of the tax, nor in the subject to which it applies, but are solely in the measure of the tax and in the means provided for its enforcement and collection. Neither the present law nor the earlier ones were taxes on property, but are alike excises upon the privilege of having "an establishment" or "place of business" in Massachusetts. Under the earlier laws it was held that the State could not tax the subject, where the taxpayer's business was exclusively interstate commerce. This decision was not predicated upon the means provided for enforcing the tax, but upon the entire immunity of the subject taxed. In the *Cheney Bros. Co.* case (*supra*) the Court said:

> "the maintenance of the Boston office and the display therein of a supply of samples are in furtherance of the company's interstate business and have no other purpose. Like the employment of the salesmen, they are among the means by which that business is carried on and share its immunity from state taxation" (p. 153).

Concededly, in this case, the company's place of business in Massachusetts is maintained exclusively as a means of carrying on interstate commerce; and as in the *Cheney Bros.* case, that "means" is immune from State

taxation. The question of enforcement, of penalties for non-payment, was not mentioned by this Court, and formed no part of the basis of its decision. Specifically, the State Court distinguished the present statute from those previously condemned by this Court (Record, Case 103, pp. 24, 25 and 29) on the ground that payment of the tax is not here expressly made a condition precedent to doing business, and that the statute does not in terms prohibit interstate business if the tax is not paid. As to this it is sufficient to say that it has never been held that this is a necessary requisite of an invalid restraint on interstate commerce. Where payment of an otherwise valid tax is made a condition precedent of the right to do an interstate business, the condition or penalty is void.

> *St. Louis S. W. Ry. Co.* v. *Arkansas,* 235 U. S., 350.

But it has never been suggested in any case that the omission of such an invalid condition, validated an otherwise invalid tax, or conferred jurisdiction to tax that which is not legally taxable.

That the validity of the tax is not affected by the validity or invalidity of the means for enforcing it was recognized in *Shaffer* v. *Carter,* 252 U. S., 37, where the Court said, at page 49:

> "The tax might be valid, although the measures adopted for enforcing it were not."

We submit that the differences in the means of enforcing this act from those provided in the Act of 1909 do not affect the question of the validity of the tax, and that these cases are directly ruled by the *Cheney Bros.* case.

Furthermore in distinguishing the present statute from that condemned in the *Cheney Bros* case on the ground that under the earlier statute "the right to do

business depended upon the payment of the tax," the State Court must have overlooked the provisions of Section 75 of the statute (*supra* p. 5). This section provides that if the tax is not paid the attorney general may bring suit by an information in which "the Court may issue an injunction upon such information, restraining the further prosecution of the business of the company association or corporation until such taxes with interest and costs thereon have been paid."

Applying the rule of substance we submit that "the right to do business depended upon payment of the tax" under the present statute just as it did in the statute of 1909 condemned in the *Cheney Bros* case and that the State Court erred in distinguishing between the two statutes on this ground.

The privilege of doing an interstate business in Massachusetts, the subject here sought to be taxed, is protected by the Commerce Clause of the Federal Constitution; and if the subject is protected, consideration of the means by which the amount of the tax is reached must be immaterial; and this Court has held that the subject is protected. Furthermore, the rule here contended for is well settled, and does not depend upon the authority of a single case.

In *State Freight Tax*, 15 Wall., 232, 272, this Court said:

> "It has repeatedly been held that the constitutionality or unconstitutionality of a state tax is to be determined, not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid."

This court said in *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S., 282, 291:

> "A corporation of one state may go into another, without obtaining the leave or license of the latter, for all the legitimate purposes of such commerce; and any statute of the latter state

> which obstructs or lays a burden on the exercise of this privilege is void under the commerce clause."

In *Crutcher* v. *Kentucky,* 141 U. S., 47, 57, the Court said:

> "To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject."

In *Kansas City Ry.* v. *Kansas,* 240 U. S., 227, 231, the court said:

> "It must be assumed, in accordance with repeated decisions, that the state cannot lay a tax on interstate commerce 'in any form' by imposing it either upon the business which constitutes such commerce or the privilege of engaging in it or upon the receipts as such derived from it."

In *McCall* v. *California,* 136 U. S., 104, a railroad between New York and Chicago established an agency in San Francisco to solicit business. In holding a tax "imposed upon the agent for the privilege of doing business in San Francisco is a tax upon interstate commerce and is therefore unconstitutional," the Court quoted with approval Pomeroy's definition of commerce in his work on "Constitutional Law," Section 378:

> "It includes the *fact of intercourse and of traffic* and the subject matter of intercourse and traffic. The fact of intercourse and traffic, again, embraces all the *means, instruments* and places by and in which intercourse and traffic are carried on, and further still comprehends the act of carry-

> ing them on at these places and by and with these means. The subject matter of intercourse or traffic may be either things, goods, chattels, merchandise, or persons. All these may therefore be regulated."

This decision was followed in the very recent case of *The Texas Transport & Terminal Co.* v. *New Orleans*, 264 U. S., 150, where the Court stated:

> "the general and well established rule, which is that a state or state municipality is powerless to impose a tax upon persons for selling or seeking to sell the goods of a non-resident within the state prior to their introduction therein, *Stockard* v. *Morgan*, 185 U. S., 27; or to impose a tax upon persons for securing or seeking to secure the transportation of freight or passengers in interstate or foreign commerce" (*McCall* v. *California*, 136 U. S., 104).

In *Norfolk & Western R. R. Co.* v. *Pennsylvania*, 136 U. S., 114, the state imposed a tax for the privilege of keeping an office in the State for the use of its officers and employes. That is, the subject taxed was precisely the same as in the case at bar. In holding the tax void, the court said:

> "That office was maintained because of the necessities of the interstate business of the company, and for no other purpose. A tax upon it was, therefore, a tax upon one of the means or instrumentalities of the company's interstate commerce; and as such was in violation of the commercial clause of the Constitution of the United States." P. 120.

In *Crenshaw* v. *Arkansas*, 227 U. S., 389, the Court reiterated the rule stated in *Robbins* v. *Shelby County Taxing District*, 120 U. S., 489, saying:

> "The negotiation of sales of goods which are in another state for the purpose of introducing them into the state in which the negotiation is made, is interstate commerce, and it was held beyond the power of the state to impose a license tax upon the privilege of conducting such business. That case has been strictly adhered to in this court since its decision, and it is only necessary to notice a few of the many cases in which it has been applied."

To the same effect are:

Philadelphia & Southern S. Co. v. *Pennsylvania*, 122 U. S., 326;
Leloup v. *Mobile*, 127 U. S., 640;
Lyng v. *Michigan*, 135 U. S., 161;
Galveston, Harrisburg, &c., Ry. v. *Texas*, 210 U. S., 217;
West. Union Tel. Co. v. *Kansas*, 216 U. S., 1;
Pullman v. *Kansas*, 216 U. S., 56;
Meyer v. *Wells, Fargo & Co.*, 223 U. S., 298;
Baltic Mining Co. v. *Massachusetts*, 231 U. S., 68;
Stockard v. *Morgan*, 185 U. S., 27;
Caldwell v. *North Carolina*, 187 U. S., 622.

As the privilege here sought to be taxed is the plaintiff's engaging in interstate commerce, and nothing else, the foregoing authorities would seem definitely to dispose of these cases, and to require a reversal of the judgments of the State Court.

POINT IV.

The tax is not in substance a tax on property.

The State Court expressly construed this tax to be an excise on the doing of business, and not a property tax (Record, case 103, p. 25).

> *Judson Freight Forwarding Co.* v. *Commonwealth,* 242 Mass., 47, 51.

As we have shown in the preceding point, this construction was necessary to avoid the limitations of the State Constitution. This was, therefore, a true construction of the act and a determination of the subject taxed by the highest Court of the State and is binding on this Court.

> *Ward & Gow* v. *Krinsky,* 259 U. S., 503;
> *Northern Pacific R. R. Co.* v. *Meese,* 239 U. S., 614;
> *Brown* v. *Kentucky,* 217 U. S., 563;
> *Price* v. *Illinois,* 238 U. S., 446;
> *Farncomb* v. *Denver,* 252 U. S., 7.

In sustaining the tax here in question, the State Court found itself between Scylla and Charybdis. On the one hand, if the tax was held to be a property tax, and not an excise, it was invalid under the State Constitution; if it was an excise on the doing of business, and not a tax on property, then as applied to the doing of interstate commerce, it was invalid under the Federal Constitution. The court accordingly held that the tax must be construed as an excise or business tax, and not as a tax on property, but sustained the tax on the authority of cases in this Court sustaining taxes as in substance taxes on property.

It is submitted that these two positions are mutually inconsistent, and that the tax cannot be construed as in substance a property tax.

The tax is divided into two parts,—one measured by what is termed "corporate excess," and the other by a portion of the corporation's net income attributed to Massachusetts. Since the determination of corporate excess is based upon the determination of the proportion of corporate income attributable to Massachusetts, we consider first that portion of the tax which is based on income.

(a) *The Tax on Income.* This part of the tax was assessed in accordance with the express provisions of the statute, which effectively negatives any contention that it was levied with any relation to the property in the State, or that it can fairly be considered as a tax on income derived from such property, or as in substance a tax on property in the State.

The following discussion is based on Case 103. Case 327 presents the same general legal question, with slight changes in the figures and computation.

It is stipulated:

> "The only property owned by the petitioner in the Commonwealth of Massachusetts, real or personal, is the office furniture in the sales office valued at about Five hundred dollars ($500)" (Record #103, p. 19).

The tax was assessed on net income apportioned to Massachusetts of $15,370., and the net income tax was $380.05. This was determined as follows.

The total net income of the corporation reported to the Federal Internal Revenue Department, less interest from bonds and notes, was found to be $1,148,041.70. This was divided into three equal parts, according to the statutory direction.

> "Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said one third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth, and whose denominator is the

value of all of the corporation's tangible property wherever situated" (Statute Sec. 38, par. 2a; Record #103, p. 35).

It was agreed that the tangible property in Massachusetts was of the value of $573. The Company contended that its tangible property outside the State was $11,735,209.40. This included $4,500,000., the value of the stock of a subsidiary company which holds title to the company's mills and real estate in Pennsylvania. The company contended that there was an equitable conversion of this stock which for the purposes of this case should be considered as tangible property. It relied upon *People ex rel Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y., 48, certiorari denied, 256 U. S., 702. The State denied this contention.

Thus, the plaintiff contended that under the statute, the proper fraction to use was $\frac{573}{11,735,209.40}$; while the State used as a fraction in assessing the tax $\frac{573}{7,235,209.40}$. The resulting income apportioned to Massachusets was, by the use of plaintiff's fraction $18.37, and by the use of the State's fraction, $30.30. The difference in dollars is insignificant. The difference is of importance because (1) the State Court sustained this ruling upon the ground that the tax on the income here levied was not the same as the New York tax, and that the case was, therefore, not ruled by the New York case; and (2) the same principle was applied in determining the value of the corporate excess taxed under another section of the statute, and whose nature is considered *infra.*

> "Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employes, and assignable to this commonwealth as hereinafter provided, and whose denominator

is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employes" (Statute Sec. 38, par. 2b; Record #103, p. 35).

"The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employes shall be such expenditure for the taxable year as represents the compensation of employes not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside of the commonwealth" (Statute Sec. 38, par. 5, Record #103, p. 36).

The company has a clerk in the Massachusetts office, and four salesmen who travel throughout New England. The total salaries paid were $17,780. Apportioning the time of the salesmen to Massachusetts, their salaries while working in Massachusetts amounted to $11,023.60. The total salaries and wages were $2,607,862.20. The company contended that under the statute the fraction should be $\frac{11,023.60}{2,607,862.20}$, giving an apportionment of income to Massachusetts under the second subdivision of this section of the statute of $1,607.26; while the State, rejecting this contention, and including the salaries of the men selling goods in interstate commerce in other States, used the fraction $\frac{17,780}{2,607,862.20}$, giving an apportionment of income to Massachusetts of $2,609.05. Here again the money difference is insignificant. The important point is that there is no conceivable relation between this apportionment of income and the company's property in Massachusetts. It is an apportionment, not, it is true, of direct receipts in interstate commerce, but of direct expenses in interstate commerce. And the rejection of the company's contention in this respect emphasizes the absence of any relation between this tax on income and the property within the State, or the income thereon. Obviously, this part of the tax has no relation

to property. It is concerned solely with interstate commerce as such. It is definitely a tax on salesmen travelling in interstate commerce. This has often been held illegal.

Robbins v. *Shelby County Taxing District*, 120 U. S., 489.

The fact that the ultimate tax is measured by net income from this interstate commerce instead of being a per capita fee obviously does not change the subject taxed. A State cannot by indirection levy a tax which it is forbidden to levy directly.

Welton v. *Missouri*, 91 U. S., 275.

So far as this portion of the tax is concerned, it is not in any respect affected by the presence or absence of property in the State, and it would not be lessened if the company owned not one penny therein.

> "Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business" (Statute Sec. 38, par. 2c; 5; Record #103, p. 36).
>
> "The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (*a*) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business, owned or rented by the corporation outside of the commonwealth, and sales otherwise determined by the Commissioner to be attributable to the business conducted on such premises;

(*b*) rentals or royalties from property situated, or from the use of patents, within the commonwealth. * * * If a corporation maintains an office, warehouse or other place of business in a state other than this commonwealth for the purpose of reducing its tax under this chapter, the Commissioner shall, in determining the amount of its gross receipts from business assignable to this commonwealth, include therein the gross receipts from sales attributed by the corporation to the business conducted at such place of business in another state" (Statute Sec. 38, pars. 6, 7; Record #103, p. 36).

There was no dispute in construing the statute as to its application to the plaintiff in connection with this item. Under this definition of business assignable to Massachusetts, the gross receipts were returned as $424,982.70, and the gross receipts from all business at $12,774,825.05, and the mathematical calculation gave $12,730.71 as the share of net income of the corporation apportioned to Massachusetts under this section of the statute.

Here, again, the basis of assessment obviously has no relation whatever to property in the State. The subject taxed was the sale by the corporation in interstate commerce to customers ordering through salesmen traveling from the Massachusetts office. The distinction is clearly marked and defined in the cases. For example, in *Pullman* v. *Richardson,* 261 U. S., 330, the corporation had a large amount of property in the shape of Pullman cars located in the State of California. These cars were used in part in interstate commerce, and in part in intrastate commerce. A tax was levied, which this court held was merely an ordinary tax upon the property in the State, a subject which the State had admitted jurisdiction to tax, even though that property was an instrumentality used in interstate commerce. The court sustained a method of valuing that property and

of measuring the tax which took into account the gross receipts proportioned in accordance with mileage.

So, in the recent case of *Seaboard Air Line* v. *Daughton,* 262 U. S., 413, a tax on the net income of railroads apportioned according to the mileage of the roads within and without the State, was sustained as in substance a tax on the income derived from the use of property which was itself subject to the taxing power of the State.

But obviously, the gross receipts in this case, $424,982, have no relation to property valued at $573. The gross receipts might have been just as large if the property was of no value, and there might well have been property of large value with no gross receipts. In the railroad cases and other similar decisions by this Court, in which a tax measured by interstate commerce has been sustained, there has been some reasonable relation between the measure of the tax and the value of the property which was held to be in substance the subject taxed.

The question of the validity of the tax, construed as a tax on property, is considered in a subsequent point. Here we confine ourselves to showing that the tax cannot fairly be considered as a tax on property.

The real test as to whether this statute can be construed as a tax on property within the State measured by income is found in the question whether or not the tax as actually assessed and paid is more than a reasonable tax on the property, considered as an ordinary property tax. Here it is stipulated and agreed that the total value of the property, real and personal, in the State of Massachusetts was only about $500. The tax on income levied and paid in connection with this property was $380.05, to which must be added the further sum of $420.01, the tax measured by the corporate excess, and which can be sustained, if at all, only upon the theory that it is also a tax on property within the

State. We have, therefore, an annual tax of $800 on property of an agreed value of $500. Obviously, this is not a normal and reasonable tax on property. Clearly, the tax is not levied at all upon property in the State, but upon something else; and this leads inevitably to the conclusion that the something else which is taxed in this case is that which is used as the measure of the tax, —to wit, the interstate commerce.

(b) *The tax on corporate excess.* Similarly, the portion of the tax measured by corporate excess cannot be construed as a tax on property subject to the State's taxing jurisdiction. This tax is at the rate of $5 a thousand upon the value of the corporate excess employed by it within the Commonwealth. Section 30 of the statute provides:

> " 'Corporate excess employed within the Commonwealth' by a foreign corporation, such proportion of the fair value of all the shares constituting the capital stock on the first day of April when the return called for by section 35 is due as the value of the assets, both real and personal, employed in any business within the Commonwealth on that date, bears to the value of the total assets of the corporation on said date."

less certain deductions not applicable to the case at bar.

The method of calculation of the assessment of corporate excess is not shown in detail in the record in Case 103. All that there appeared was the stipulated fact that the only property, real or personal, in the State was office furniture valued at about $500 (Record #103, p. 19), more accurately stated at page 14 at $573. The corporate excess was valued at $84,001.21. While the way in which this surprising result was reached is not shown in this case, the State Court explained it in its opinion (Record #103, p. 29), saying:

> "The tax upon the petitioner in substance and effect, so far as concerns the factor of its corpo-

> rate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth and upon the exercise of its franchise within this Commonwealth."

The Court thus recognized that a corporate excess valuation of $84,001.21 could not be based on a property valuation of $573.

While the detail is not shown in the record, there is no dispute as to the computation. The proportion that the portion of the remainder of income allocable in Massachusetts under the provisions of Section 41 of the Act bears to the total of said remainder of income, was applied to the total intangible assets of the corporation, the product being assumed to be the amount of intangible assets employed in business in Massachusetts. This was added to the local tangible assets, and the sum was considered the total assets employed in business in Massachusetts under the statutory formula.

Applying this formula, to the $573, value of tangible property, there was added the sum obtained by multiplying the corporation's total intangible assets as determined—that is, $8,577,655 by the fraction $\frac{15370}{\$1,148,041.70}$.

In this fraction the numerator represents the total net income apportioned to Massachusetts under the forty-second section of the statute, and which we have already considered; and the denominator represents the corporation's total net income. That is, there was apportioned to Massachusetts as its share of the value of the corporation's interstate commerce franchises and receivables the sum of $114,837, and the property in the State of $573 was thus arbitrarily increased so that the application of the statutory formula gave an assessment of corporate excess of $84,001.21. We submit that the tax on corporate excess construed to be measured by a

proportion of interstate commerce applied to property without the State, cannot be construed as in substance a tax on property in the State.

The method of assessing corporate excess was shown in detail in the record of Case No. 327, and is summarized *supra*, p. 10. It was the same as that just explained in connection with Case 103. In the second case the State Court, after saying the computation was in conformity with the statute, continued:

> "The former decision rested in its ultimate analysis upon the theory that under the statute the excise might be measured in part upon intangible assets of the petitioner having a situs in this Commonwealth and arising exclusively from the conduct of its interstate business" (Case #327, fol. 95).

And the opinion then seeks to establish the legal jurisdiction to impose a property tax on credits arising in interstate commerce. The legality of such a tax is considered in the next point.

Here, we emphasize that this tax on corporate excess is not in fact in substance a property tax on credits. Aside from the negligible tangible assets corporate excess is determined by two factors: (1) the amount of plaintiff's intangible assets, and (2) the proportion thereof assigned to Massachusetts. Of the first of these, the total intangibles were (in Case 103) $8,577,655, of which only $652,313 consisted of accounts receivable. That is, less than ten per cent of the base were credits. Of the second factor, the amount of credits existing at any one time was not shown at all. But assuming an allocation of gross receipts is equivalent to an allocation of credits, that allocation is applied to only one-third of the income; and the resulting proportion is applied to a base of which less than ten per cent. represents the value of credits. Obviously, therefore, the allocation of intangibles to Massachusetts is not in substance based upon credits due

from Massachusetts customers. If credits are in proportion to sales (which the state court seems to have assumed), the credits in Massachetts would have been

$$\frac{424982 \text{ Mass. sales}}{12774825 \text{ gross sales}} \times \$652{,}313 \text{ (total credits)} = \$21{,}656.79$$

And further the Massachusetts sales were not under the statute sales to Massachusetts customers, but were sales made throughout New England by salesmen traveling from the Massachusetts office.

The actual assessment assigned more than $114,000 of intangibles to Massachusetts. The admitted facts do not support the dictum of the state court that the tax on corporate excess is in substance a tax on credits arising from sales to Massachusetts customers.

If in construing this part of the statute, the State Court had held that "assets employed in business" in Massachusetts meant, as on a literal reading it would seem to mean, property real and personal in the State, then it might fairly be contended that this part of the tax was in substance a tax on such property. Since the value of its capital stock was somewhat less than its total assets, because of the deduction of liabilities, the corporate excess on that construction would have been valued at less than $500, and the tax assessed at about $2.50.

Of course, the question here presented is as to the legal significance of the tax as it has been construed by the State Court and enforced against the plaintiff. So construed, it seems clear that an assessment of corporate excess of $84,000 cannot be considered as in substance an assessment and tax upon property of the agreed value of $500, and that idea was definitely repudiated by the State Court in its opinion in Case 327. The suggestion that this tax is in substance a tax on property by the State Court is a mere characterization of the statute, which does not bind this Court, as distin-

guished from a construction or interpretation of a statute, which does control.

Federal Land Bank v. *Crosland,* 261 U. S., 374, 378;
St. Louis, Southwestern Ry. Co. v. *Arkansas,* 235 U. S., 350, 362;
St. Louis Cotton Compress Co. v. *Arkansas,* 260 U. S., 346.

The admitted fact is that the tax department had no evidence not in the record in making this assessment. The report upon which this assessment was based does not show the amount of receivables due from Massachusetts customers existing at any time or on an average. This information was not requested, nor desired, nor furnished. If the tax was to be considered as a tax on property, and the assessment a means of valuing these credits as property, then it is obvious that a direct statement as to their amount and value would have been required. We submit that to characterize this tax as equivalent to a tax on an assumed credit as property is quite unwarranted by the facts in the case.

Plaintiff, of course, recognizes the rule stated in *Adams Express Co.* v. *Ohio,* 166 U. S., 185, that tangible property of a corporation may have a greater value considered as a part of the property of a going concern, than when considered as detached and separate from all other property. Conceivably, plaintiff's office furniture, thus considered, might have a greater value than when considered as separate articles. But this tax cannot be sustained upon any such theory, because

(1) In Case No. 327 the State Court expressly held that the tax was not based upon any such theory and that the assessment was based not upon a valuation of these assets, but upon intangibles.

(2) It is stipulated in Case 103 that the value of all of plaintiff's property in Massachusetts was "about $500." In the face of this stipulation, it cannot be contended that an assessment of $84,000 represents a valuation of that which is thus stipulated to be worth only $500.

(3) Any enhancement of actual physical values must proceed upon some reasonable basis, which will ordinarily give a fair value to the property in the State considered as a part of a going concern. The method followed in this case has no such relation. Considered with respect to the value of property in the State, the assessment is wholly arbitrary.

Plaintiff submits that as to both parts of the tax, it is a tax on interstate commerce and not a tax on property.

POINT V.

If that portion of the tax measured by "corporate excess" can be construed as in substance a tax on property, it is invalid because in conflict with the commerce clause and the XIV amendment to the Constitution.

(a) It is in conflict with the commerce clause.

The theory upon which the State Court has sustained that portion of the tax measured by corporate excess is not altogether clear, but it was apparently that this part of the tax could be considered as in substance a tax on property. Thus, the Court said, in Case 103, page 29, the tax

> "in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth is levied upon its tangible per-

sonal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth, and upon the exercise of its franchise within the Commonwealth."

And again, the Court said:

"It is manifest as matter of common business knowledge that commerce within this Commonwealth yielding to the petitioner annual gross receipts of $424,982.70, must have involved credits, bills receivable, and obligations to it of considerable amounts. No contention to the contrary has been urged by the petitioner. Such credits, bills receivable, and obligations might be made subject to direct taxation within the Commonwealth by appropriate legislation under numerous decisions of the United States Supreme Court. Such credits, bills receivable, and obligations constitute a part of 'the value of the assets' of the petitioner 'employed in business within the Commonwealth' used as the basis of ascertaining 'the corporate excess' of the petitioner 'employed within the Commonwealth' upon which this factor of the excise is calculated" (Case #103, p. 26).

And this view was amplified in Case No. 327, where the Court said:

"The former decision rested in its ultimate analysis upon the theory that under the statute the excise might be measured in part upon intangible assets of the petitioner having a situs in this Commonwealth and arising exclusively from the conduct of its interstate business. We understand that credits due from residents within this Commonwealth to non-residents may be made the subject of direct property taxation here. *Metropolitan Life Ins. Co. of New York* v. *New Orleans*, 205 U. S., 395; *Liverpool, London & Globe Ins. Co.* v. *Orleans Assessors*, 221 U. S., 346; *Board of Assessors* v. *Comptoir National D'Escompte*, 191 U. S., 388; *Shaffer* v. *Carter*, 252 U. S., 37, and cases there reviewed. The source from which such cred-

> its arise is not material. They are not immune from taxation because coming into existence through the transaction of interstate commerce. That being so, it would seem that such credits may be used as a measure of an excise" (Case #327, fols. 95, 96).

As to the last sentence in this quotation, it is, of course, true that property which is in itself exempt from taxation may lawfully be "used as a measure of an excise," always providing the excise is itself upon a subject that may be lawfully taxed. But the state's argument here is that while the excise is in form on a subject immune from taxation, the tax can be sustained on the theory that it is in substance a tax on property which can be directly taxed. As to this, therefore, the question is not whether these credits can be used as the measure of an excise, but whether the credits can be themselves directly taxed.

In holding that these assumed credits were subject to direct taxation by the State, and that therefore the use of these credits in determining corporate excess could be sustained as in substance equivalent to a property tax thereon, the Court entirely overlooked the nature of these credits. Its statement that, "the source from which such credits arise is not material," is hardly in accordance with the decisions of the Court cited and relied upon.

These cases dealt solely with the question as to whether the credit considered as property had a *situs* in the taxing State.

In all of them the taxpayers were doing a local business in the State, and the credits existed as a part of this business. In the *Liverpool* case the decision was rested directly upon this ground, the Court saying:

> "The indebtedness had its origin in the course of business transacted by the foreign corporation in Louisiana under the laws of that state" (p. 353).

"The credits would have had no existence save for the permission of Louisiana; they issued from the business transacted under her sanction within her borders" (p. 355).

But here the plaintiff's business is not transacted under the laws of Massachusetts; nor is it transacted by virtue of any sanction from that State. Its business is exclusively interstate commerce transacted under the sole sanction and protection of the Federal Government and the Federal Constitution.

The reason for assigning a *situs* at the debtor's residence to credits fails when those credits arise, not by virtue of, but regardless of, the sanction or permission of the State of the debtor's residence.

If a debtor residing for example in New York removes his residence to Massachusetts, it would hardly be contended that the mere fact of residence operated to make the debt taxable property in the hands of the debtor and at the place of his residence. When such a *situs* has been given it has invariably been because the circumstances attending the creation of the debt or the actual location of the physical evidence thereof operated to give it a local *situs*. It has never been suggested that debts arising from interstate commerce were so affected and none of the cases so hold.

We submit that as a matter of *situs* these credits arising wholly from and as a necessary incident to interstate commerce are not property at the residence of the debtor.

While, as a matter of fact, we have shown that the determination of corporate excess was not based upon these credits, but upon a calculation and computation attempting to measure the value of the plaintiff's interstate commerce, it is submitted that even if the corporate excess tax be considered as in substance, as the State Court has suggested, a property tax on these credits, they are not taxable. This is true because they not only

have no taxable *situs*, but because they are not taxable *subjects*. Property may have a *situs* in the State and still be exempt from taxation. This is always the case where the property is the subject of interstate commerce. The fact that it is present in the States does not give the State jurisdiction to tax it if that property constitutes, at the time the tax is attempted to be imposed, interstate commerce. This involves the distinction between a tax upon interstate commerce and a tax upon an instrumentality used in interstate commerce.

It is well settled that a State cannot lay a direct tax upon interstate commerce and, also, that a tax upon a subject otherwise properly liable to the State's taxing jurisdiction is not necessarily bad because it has an indirect effect upon interstate commerce. In the latter case the question is one of degree, that is, applying the rule of substance, is the tax in reality a direct burden on interstate commerce?

The question as to whether a property tax upon credits arising in interstate commerce is an invalid restraint upon the commerce does not appear to have been directly passed upon by this Court. While the Court has avoided the declaration of a formula to test the general validity of State taxes under the commerce clause, the ratio *decidendi* of the cases indicates that, viewed as a property tax on credits, the tax here imposed is invalid.

A State *cannot* impose a property tax on tangibles temporarily present in the State as a part of interstate commerce.

Champlain Realty Co. v. *Town of Brattleboro*, 260 U. S., 366;
Hays v. *Pacific Mail SS Co.*, 17 How., 596.

A State *can* impose a property tax on tangibles present in the State, destined thereafter to move in interstate commerce.

Coe v. *Errol*, 116 U. S., 517.

A State *can* impose a property tax on tangibles present in the State, which have been brought there in interstate commerce, and which are destined thereafter to move in interstate commerce.

Bacon v. *Illinois*, 227 U. S., 504.

In the case of a property tax on tangibles then the test is clear. If the property is at the time the tax is imposed moving in interstate commerce, it is immune from State taxation, while if it is merged into the general mass of property in the State it can lawfully be taxed, although it has been in the past or will be in the future, moved in interstate commerce and therefore be at that time immune from taxation.

So a State *cannot* impose a sale or occupation tax on a contract for a sale and delivery across State lines.

Sonneborn Bros. v. *Cureton*, 262 U. S., 506, and cases cited at p. 515.

But a State *can* impose a sale or occupation tax on property which has previously been brought into the State in interstate commerce.

Sonneborn Bros. v. *Cureton (supra).*

And a State *can* impose an occupation tax on the production of property destined thereafter to move in interstate commerce.

Oliver Iron Mining Co. v. *Lord*, 262 U. S., 172.

It is apparent there is no magic in the distinction between a property tax and an excise tax. The test of validity is the same on excise taxes as on property taxes. If the excise directly affects interstate commerce it is void, while if it is upon something local which the State can regulate and control it does not infringe the com-

merce clause, although the privilege taxed may in turn have an affect upon interstate commerce.

It is apparent that in this connection interstate commerce consists essentially of three things: (1) the contract of sale, (2) the transportation of goods, (3) payment for the goods.

Without all of these the commerce cannot exist. A tax on the credits existing between the making of the sale and the payment is in substance a tax upon the contract because the contract is not executed until it has been performed by both parties. All contracts of sale are reciprocal and involve an obligation on each of the two parties. The seller agrees to ship the goods in interstate commerce, the buyer agrees to ship the money in interstate commerce. The entire transaction is single. A State can no more impose an excise tax on the paying for the goods than it can on selling or shipping them. It cannot impose a property tax on the credits arising from the sale under different conditions than on the tangible property sold.

There is in this respect no essential difference between a property tax on tangibles and one on intangibles. Neither can be taxed while they are a part of interstate commerce. Either can be taxed when they are a part of the general mass of property in the State, although they have previously been a part of interstate commerce. Tangibles may be taxed when the interstate commerce movement has ended and the goods are at rest. But the fact that the goods are at rest does not make them subject to taxation, if the interruption of movement was due to the exigencies of the commerce and was a mere incident thereto.

So, we submit, is also the rule as to intangibles. While the credit exists as a part of an uncompleted transaction in interstate commerce it is immune from State taxation as an essential part of the commerce itself. When, however, the seller collects the bill, the

money received whether held as specie or deposited as a credit in a bank becomes part of the general mass of property and is subject to tax. So perhaps if the seller accepts a negotiable instrument in *payment* of the debt, the debt evidenced thereby may cease to be a part of interstate commerce and may be merged as part of the general mass of property and become subject to property taxation.

In the case at bar there is no suggestion of any such conversion within the State of Massachusetts. It is agreed that the plaintiff does not keep the proceeds of its interstate sales within the State of Massachusetts. So far as Massachusetts is concerned the credits never lose their interstate character and never become a part of the mass of property in the State.

The distinction here drawn was made by this Court in *Burke* v. *Wells,* 208 U. S., 14. That case involved goods imported from abroad and sold in the original packages. Of course the immunity of such imports differs from that attaching to imports in interstate commerce. But the question there was as to whether the proceeds of sale had lost their identity so as to become merged into the general mass of property. There notes were received in payment for the goods, were not sent abroad, but were kept in New York. Money received in payment for the goods or of the notes was not sent abroad but was deposited in a bank account in New York and was used to pay the expenses of the New York business. Only the surplus proceeds were from time to time sent abroad.

The Court held that while the proceeds of the sale of the goods "were not directly taxable as such any more than the goods themselves," the notes and cash received in payment had been so dealt with by the owner as to become subject to taxation as other property.

But in the case at bar, we submit, the agreed statement of facts makes it clear that this is not so. Here

the regular course of business is payment direct by the customer to plaintiff in Pennsylvania. No bank account is kept in Massachusetts. Expenses are not paid from Massachusetts. No money is ever collected or paid in Massachusetts except in the case of delinquent accounts, and even then is immediately remitted intact to Pennsylvania.

In so far as credits may be assumed to arise in the conduct of plaintiff's interstate commerce business, these credits remain essentially a part of interstate commerce, and never lose their distinctive character as such and do not become a part of the general property in the State of Massachusetts nor subject to its taxation.

It is settled that a State tax on gross receipts in interstate commerce is invalid as in substance a tax on the commerce itself.

> *Crew Levick Co.* v. *Penn.*, 245 U. S., 292;
> *Phila. & Southern Steamship Co.* v. *Penn.*, 122 U. S., 326.

And the full force of this rule has not been limited by cases upholding a tax on property subject to the State's taxing jurisdiction measured by gross receipts, as in *Pullman Co.* v. *Richardson*, 261 U. S., 330. This is so, because when the State has jurisdiction over a taxable subject, the tax is not necessarily invalidated because measured by property which is not itself subject to tax.

> *Flint* v. *Stone Tracy Co.*, 220 U. S., 107.

But here the State seeks to uphold the tax on the ground that the credits, that is the gross receipts, are themselves subject to direct property taxation. We do not have here a tax in form on gross receipts, claimed to be in substance a tax on something else which is prop-

erly subject to tax, but instead there is here a tax in form a direct tax on interstate commerce claimed to be in substance a tax on credits arising from such interstate commerce.

We submit there is no legal distinction between a tax on property being transported in interstate commerce and a tax on the money paid by the purchaser for the goods purchased in interstate commerce. Nor is there any distinction between a tax on the value of the goods themselves, and on the credits arising from the sale of the goods, and on the gross receipts from the sale.

The reasons why a tax on gross receipts is a direct tax on the commerce were pointed out in *Phila. & Southern S. S. Co.* v. *Penn., supra.* And these reasons are directly applicable to show that a tax on credits arising from sales in interstate commerce is also a direct tax on the commerce. In that case the Court said:

> "If, then, the commerce carried on by the plaintiff in error in this case could not be constitutionally taxed by the state, could fares and freights received for transportation in carrying on that commerce be constitutionally taxed? If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not at mere forms, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company, 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning (p. 336) * * *.
>
> "Of what use would it be to the ship-owner, in carrying on interstate and foreign commerce, to have the right of transporting persons and goods

> free from state interference, if he has not the equal right to charge for such transportation without such interference? The principal object of his engaging in transportation is to receive pay for it. If the regulation of the transportation belongs to the power of Congress to regulate commerce, the regulation of fares and freights receivable for transportation must equally apply to that power; and any burdens imposed by the state on such receipts must be in conflict with it. To apply the language of Chief Justice Marshall, fares and freights for transportation in carrying on interstate or foreign commerce are as much essential ingredients of that commerce as transportation itself" (p. 338).

In *Crew Levick Co.* v. *Pennsylvania* (*supra*) the Court extended the same reasoning to apply to the gross receipts from the sales of a commercial business across State lines that it had previously applied to the Steamship Company directly engaged in the business of transportation. We submit that there is no distinction between the credits existing at any moment of time from sales in interstate commerce, and the gross receipts received over a period of time from sales in the same commerce. The gross receipts are merely the sum of the separate credits that arise. If the State can tax the credits individually, it can equally tax the gross receipts collectively. There is no difference in kind.

In *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282, at page 290 this court said:

> "The Commerce Clause of the Constitution, Art. 1, Sec. 8, cl. 3, expressly commits to Congress and impliedly withholds from the several states the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different states and all the component parts of that intercourse. Where goods in one state are transported into an-

other for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland,* 12 Wheat, 419, 446-447; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. *American Express Co.* v. *Iowa,* 196 U. S. 133, 143. This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton* v. *Missouri,* 91 U. S. 275, 280; 'Commerce is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities.' In *Kidd* v. *Pearson,* 128 U. S. 1, 20, it was tersely said: 'Buying and selling and the transportation incidental thereto constitute commerce.' In *United States* v. *E. C. Knight Co.,* 156 U. S. 1, 13, 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.' And in *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 241, the court referred to the prior decisions as establishing that 'interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities.' In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

Champlain Realty Co. v. *Brattleboro* (*supra*), holds that the property itself is immune from taxation, and *Dahnke-Walker Milling Co.* v. *Bondurant,* gives a defi-

nition of interstate commerce sufficiently comprehensive to include in its immunity the credits derived from the sale as well as the actual contract of sale and the goods themselves.

Finally, after saying that a commerce of the volume of plaintiff's must have involved credits due from its customers, which would be subject to direct taxation by the State, the State Court, in Case 103, concluded:

> "This branch of the case seems to us to come within the scope of these words in *Shaffer* v. *Carter*, 252 U. S. 37, at 52, 'This is consonant with numerous decisions of this court sustaining State taxation of credits due to non-residents, *New Orleans* v. *Stemple*, 175 U. S. 309, 320 et seq., *Bristol* v. *Washington County*, 177 U. S. 133, 145; *Liverpool etc. Ins Co.* v. *Orleans Assessors*, 221 U. S., 346, 354; and sustaining federal taxation of the income of an alien non-resident derived from securities held in this country, *DeGanay* v. *Lederer* 250 U. S., 376.'" (Record #103, p. 26).

Of course, the main question in the *Shaffer* case was whether a State could impose an income tax on a non-resident, even though the source of the income was property or business within the State. The principle stated by Mr. Justice PITNEY immediately preceding the quotation was

> "And we deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon incomes accruing to non-residents from their property or business within the State or their occupations carried on therein."

We have shown that the cases there cited do not sustain a State property tax on credits in interstate commerce.

Apparently, the State Court considered that this quotation from the *Shaffer* case justified its dictum that these credits were subject to direct taxation by the State as property having a *situs* therein. If this is a correct construction of this part of the Court's opinion, it is submitted that it is erroneous.

Assuming such credits in fact existed, they are immune from State taxation, because they are not instrumentalities used in interstate commerce, but the commerce itself.

Assuming that such credits exist in the case at bar, they exist as a part of interstate commerce. The State Court assumed them as normal and necessary incidents of interstate commerce. As such, their presence or *situs* in the State was a mere incident to such commerce. If under the stipulation they can be considered as existing at all, they are clearly immune from taxation.

The State Court's conclusion as to that part of the tax depending upon the value of the corporate excess seems, then, to be that while the tax is to be construed under the State law and the State constitution as a tax upon the privilege of maintaining an instrumentality of interstate commerce in the State, it can be sustained under the Federal Constitution as in substance a tax upon property within the State.

In so far as that conclusion rests upon the principle that this Court will look at the substance, and not at the form, plaintiff does not question it. But we submit that looking at substance and not at form, the tax here in question cannot be sustained as "no more than an ordinary tax on property." A tax at the rate of $5 a thousand is levied upon an assessed value of $84,001.21, making an annual tax of $420.01, upon the property of an agreed value of "about $500." The difference is sought to be explained by an assumption that direct receipts in interstate commerce constitute taxable property in the State. If this is to be considered as in substance a tax

on property, it is on the basis that gross receipts from interstate commerce derived from sales to residents of Massachusetts, are all considered as property within the State subject to the State's taxing jurisdiction. So far as this phase of the case is concerned, it is immaterial whether the tax be considered as an excise upon the doing of interstate commerce, or as a property tax upon the property the subject of interstate commerce. It is alike invalid as constituting a direct burden and restriction upon such commerce, which is beyond the power of the State.

The State Court further holds, in Case 103, as to the tax on corporate excess, that it is measured, in addition to its tangible property and credits from interstate commerce, by "its franchise", employed in Massachusetts. This part of the tax is then measured, in part, by the plaintiff's franchise to do an exclusively interstate commerce business. It is agreed that the only franchise used by the plaintiff in Massachusetts is the franchise of engaging in interstate commerce. The tax is in substance, as well as in form, upon the privilege of engaging in interstate commerce, and of maintaining as a means of conducting such commerce a place of business in Massachusetts. The cases relied upon by the State Court to sustain a tax on the franchise are not authorities for State taxation of the franchise or privilege of engaging in interstate commerce, but rather for State taxation of property subject to its taxing jurisdiction. They are quite inapposite to the facts in this case.

Thus, in *Western Union Tel. Co.* v. *Mass.*, 125 U.S. 530, the tax was sustained as in effect a tax on "account of property owned and used" in Massachusetts. But here it is stipulated that of the corporate excess assessment of $84,001.21, only $500 was property owned and used in Massachusetts. 99% of this part of the tax is not either in form or in effect a tax "on account of property owned and used" and taxable in Massachusetts.

So, also in *Pullman Car Co.* v. *Penn.*, 141 U. S., 18, the tax was sustained as a tax on property, the Court saying:

> "The tax * * * on account of its property within the State is in substance and effect a tax on that property."

Again, in *Pullman Co.* v. *Richardson*, 261 U. S. 330, the tax was sustained as a tax on property in the State, the Court saying:

> "The provisions under which the tax is imposed call it a property tax, specify the property subjected to it, and declare that it is in lieu of all other taxes on such property. The Supreme Court of the State holds it is a tax on the property specified. In no material respect does it differ from the tax which was recognized by this Court as a property tax in *United States Express Co.* v. *Minnesota*, and *Cudahy Packing Co.* v. *Minnesota*, above cited. * * * The tax is not claimed to be in excess of what would be legitimate as an ordinary tax on the property valued as part of a going concern."

In *Atlantic Etc. Tel. Co.* v. *Philadelphia*, 190 U. S., 160, the Court clearly distinguished that case from one such as is here under consideration, saying at page 164:

> "Neither was it a charge for the privilege of engaging in the business of interstate commerce, but it was one for the enforcement of local governmental supervision."

In that case the Court said it was for the jury to determine "whether the charge made by the city for supervision was reasonable or not", the supervision in question relating to electric wires strung in the city streets.

As to the State Court's quotation from this case, to the effect that a State may tax the franchise of a cor-

poration although that franchise is the business of interstate commerce, it is sufficient to say that although not so expressly stated, the rule was obviously limited to a domestic corporation created by the State, and over which it exercised personal jurisdiction, so that the privilege taxed was that of existing as a corporation, and not the doing of interstate commerce. The context clearly shows that the Court did not intend to hold that the franchise of engaging in interstate commerce was a subject which the State could tax. Thus, of the cases cited by this Court to sustain the rule as stated,—*Delaware Railroad Tax,* 18 Wall., 206, was a case of an ordinary tax on the right to exist as a corporation imposed upon a citizen and resident of the State. In *Postal Tel. Co.* v. *Adams,* 155 U. S., 688, 696, the Court said: "Doubtless no State could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing, or operating an instrumentality of interstate or international commerce, or for the carrying on of such commerce". In *Erie R.R. Co.* v. *Pennsylvania,* 158 U. S., 431, the tax was held to be an ordinary tax upon property in the State, and was specifically found not to be on the "occupation or business of carrying" on interstate commerce; *Central Pacific Co.* v. *California,* 162 U. S., 91, merely followed Delaware Railroad Tax (*supra*) in sustaining a tax levied by a State upon a corporation created under its laws. The fact that property otherwise taxable by a State was used as an instrumentality of interstate commerce was held not to give immunity from State taxation. In *Western Union Tel. Co.* v. *Taggart,* 163 U. S., 1, the tax was held to be merely an ordinary tax on property in the State, with no attempt to impose a tax on the franchise of doing interstate commerce. In *Western Union Tel. Co.* v. *Gottlieb,* 190 U. S., 412, the tax was sustained as one on property in the State and

not as on the franchise of engaging in interstate commerce.

In *U. S. Express Co.* v. *Minnesota,* 223 U. S., 335, the tax was sustained upon the authority of *Postal Tel. Co.* v. *Adams, (supra),* and the finding that it amounted to "no more than an ordinary tax on property". The Court said at page 346:

> "The Supreme Court of Minnesota construed the tax to be a property tax * * *. While the determination that the tax is a property tax measured by gross receipts is not binding upon this Court, we are not prepared to say that this conclusion is not well founded in view of the provisions and purposes of the law."

We submit that none of the cases cited are authority for holding that the franchise of a foreign corporation exclusively engaged in interstate commerce constitutes property in the State of Massachusetts.

If the part of the tax measured by corporate excess can be considered as a tax on property, it can only be a tax on property the subject of interstate commerce and immune from State taxation. So construed, the tax is, we submit, invalid because in conflict with the commerce clause.

(b) It is in conflict with the XIV Amendment.

Again, the tax, if considered as a property tax, is invalid because imposed upon property outside the State, and is therefore in contravention of the Fourteenth Amendment to the Constitution of the United States. The contention that the method of allocating the value of the plaintiff's business in the Commonwealth, as calculated by the Commissioner of Taxation, and sustained by the State Court, included property wholly outside of the Commonwealth in violation of the Fourteenth Amendment to the Federal Constitution does not relate

to any differences in values, or to the arithmetical calculation of the amount of the tax, but concerns the construction and constitutionality of the statute. This contention involves a consideration of the facts.

The excise, in so far as the portion measured by income is concerned, is determined by a combination of three percentages: (1) percentage of tangible assets in Massachusetts to all tangible assets; (2) percentage of wages, etc., assignable to Massachusetts to total wages; (3) percentage of receipts assignable to Massachusetts to gross receipts from all business; these percentages being applied to the petitioner's total net income.

In arriving at these percentages, the Commissioner in Case 103 deducted $4,500,000 from the total tangible assets returned by the petitioner, and added $6,756.40 to wages assignable to Massachusetts returned by petitioner, thereby considerably increasing the proportion of the petitioner's net income to be allocated to Massachusetts.

The $4,500,000 item represents the value of the petitioner's plant at Martin's Creek, Pennsylvania, its principal mill. Title to this mill is held by a Pennsylvania corporation, the stock of which is entirely owned by petitioner, title being held in this way because of the restriction in Pennsylvania regarding foreign corporations holding real estate. The subsidiary company simply holds title, and the plaintiff operates the mills, receives all the income therefrom, and pays all expenses, merely crediting the Pennsylvania Company with a nominal rental sufficient to cover depreciation (Case #103, p. 10).

The net result is that all the earnings of this important plant appear in petitioner's net income, upon which this excise is measured. In allocating the portion of such net income applicable to Massachusetts by a comparison of tangibles within and without that Commonwealth, an obviously false and misleading figure is reached if there is to be omitted in calculating the per-

centage the $4,500,000 property outside of Massachusetts, which produces a portion of the income; and since the determination of corporate excess and of assets in Massachusetts is based upon the percentage of income apportioned to Massachusetts, the error in the inclusion of this Pennsylvania Company stock as an intangible is doubled. That is, through treating this stock as an intangible, the income percentage used as a multiplier is increased, and the multiplicand is also increased, so that if the tax on corporate excess is considered as a property tax, to a substantial extent it is a tax on the stock of the Pennsylvania corporation, none of which can on any basis be given a *situs* in Massachusetts.

So considered, this exact question was raised under the New York Corporation Tax Act, which resembles this portion of the Massachusetts excise to the extent that it is based on a proportion of the entire net income allocated to New York by a comparison of total assets to New York assets.

The New York Court of Appeals in *People ex rel. Alpha Portland Cement Co.* v. *Knapp,* 230 N. Y., 48, held that an assessment ignoring the value of this Pennsylvania plant, and at the same time including the income therefrom, taxed property not within the State's jurisdiction, and was *pro tanto* unconstitutional. A rehearing was denied (231 N. Y., 516), and this Court denied a petition for a writ of certiorari (256 U. S., 702).

While in Case 327 the Department inadvertently included the $4,500,000 Pennsylvania Company stock as a tangible asset in calculating the income tax, it treated this asset as an intangible in assessing corporate excess in this case as in Case 103. In both cases, more than half of the assets assigned to Massachusetts for computing corporate excess consisted of a portion of the value of this Pennsylvania stock.

The Massachusetts State Court held that the New York decision was not applicable, apparently upon the ground that while the New York tax was in substance a

tax on property, the Massachusetts tax was not. Of course, this is what we contend, that this tax is not in substance a tax on property, but is both in substance and in form a tax on interstate commerce. If, however, the tax is in substance a tax on property, then we submit that the inclusion in the property taxed of a portion of the value of the Pennsylvania mills constitutes a violation of the Fourteenth Amendment as a taxing of property beyond the State's jurisdiction.

Wallace v. *Hines*, 253 U. S., 66, involved a North Dakota statute measuring a tax on an interstate railroad by assessing the value of its property in the State at that proportion of the total value of its stocks and bonds that the main-track mileage within the State bore to the entire line. This Court held this indefensible where it was shown that the cost of construction per mile was low in North Dakota, and that the great terminals were elsewhere.

The Court said:

> "The only reason for allowing a State to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State. Therefore, no property of such an interstate road situated elsewhere can be taken into account unless it can be seen in some plain and fairly intelligible way that it adds to the value of the road and the rights exercised in the State. Hence, the possession of bonds secured by mortgage of lands in other States, or of a land-grant in another State or of other property that adds to the riches of the corporation but does not affect the North Dakota part of the road is no sufficient ground for the increase of the tax—whatever it may be—whether a tax on property or, as here, an excise upon do-

> ing business in the State. *St. Louis, Southwestern Ry. Co.* v. *Arkansas,* 235 U. S., 350, 364. In this case, it is alleged, the tax commissioner's valuation included items of the kind described to very large amounts. The foregoing considerations justify the preliminary injunction that was granted against what would appear to be an unwarranted interference with interstate commerce and a taking of property without due process of law. *Fargo* v. *Hart,* 193 U. S., 490; *Union Tank Line Co.* v. *Wright,* 249 U. S., 275, 282" (pp. 69, 70).

The same principle (although in this case of small practical moment) applies to the question of increasing the wages allocated to Massachusetts. The facts are that the salesmen who report to the Boston office of the petitioner sell all over New England (Case #103, pp. 10, 18). The plaintiff in its return in Case 103 gave the total paid these salesmen as $17,780, but only allocated to Massachusetts that proportion of these wages which Massachusetts sales bore to other New England sales. The State Court ruled that the gross wages must all be allocated to Massachusetts. Here again the net income of the plaintiff apportioned to Massachusetts is enlarged by New England sales outside of Massachusetts. As far as corporate excess is concerned, the excise is based on the ratio of assets, tangible and intangible, employed in Massachusetts to all the assets of the corporation. The plaintiff stated in its return that the value of its tangible property in Massachusetts was $573 (the office furniture of its sales office), and that it has no intangible property in the Commonwealth. The State accepted the statement as to tangible property, but valued the plaintiff's intangibles in Massachusetts at $114,838. This result was obtained by taking that proportion of the total value of the plaintiff's intangible properties which the plaintiff's income allocated to Massachusetts, under the calculation above, bore to the plaintiff's total income.

But, as shown above, the income allocation to Massachusetts was based on a calculation which ignored assets outside the State, but included income from such assets, and also by considering as Massachusetts expenses the salaries of salesmen operating elsewhere. This arbitrarily enlarged the income attributable to Massachusetts.

It follows that, if the allocation of income to Massachusetts was arbitrary and not in accordance with the true situation, this calculation of intangibles in Massachusetts based on such income to determine corporate excess is also arbitrary and false.

In *Oklahoma* v. *Wells Fargo & Co.*, 223 U. S., 298, this Court said:

> "For, to recur to the statute, it is not simply a tax on all gross receipts within the state, which possibly might be read as intended to reach such receipts as it could, even if less than all, *Ratterman* v. *Western Union Telegraph Co.*, 127 U. S., 411, it is a tax on a proportion of total gross receipts a considerable part of which, as we have explained, the state has no right to tax. Neither the court below nor this court can reshape the statute simply because it embraces elements that it might have reached if it had been drawn with a different measure and intent."

In that case, the Court having found that the statute included a tax upon property without the State, and therefore beyond the State's jurisdiction, held the entire law invalid.

We submit that if the tax be considered as in substance one on property, other than property immune from taxation as constituting interstate commerce, it is invalid because imposed upon property outside the State and not subject to the State's jurisdiction.

POINT VI.

The part of the tax measured by net income is invalid because the subject taxed is not one which the State has jurisdiction to tax.

As to the portion of the tax measured by net income, the State Court finds in Case 103, it is "dependent upon net profits derived solely from interstate commerce." After quoting from a number of decisions of this Court, the State Court held that the constitutionality of this part of the Act was sustained by them, saying:

> "The principles there declared, as we understand them, support the validity of the tax act here involved" (Case #103, p. 29).

What these principles were was not stated by the State Court. The admitted fact is that a tax has been sustained measured by the net income received by a non-resident, whom the State has no personal jurisdiction to tax, derived exclusively from a source which the State has no constitutional power to tax. Certainly, none of the cases cited, and no other case ever determined by this Court, declare a principle that would support such a tax. Referring to the cases relied upon by the State Court:

In *Yale & Towne Mfg. Co.* v. *Travis,* 252 U. S., 60, it was held that non-resident natural persons could be taxed on such part of their net income as was derived from their personal service in the State. The State had full jurisdiction to tax the source of the income, *i. e.,* the business or occupation in the State; and it was accordingly held that it could tax the fruit as well as the tree. The tax was sustained because the State had power to tax the source from which the income was derived.

In *Peck* v. *Lowe,* 247 U. S., 165, a Federal income tax upon a citizen and resident of the United States was

sustained. It was held that the tax was not invalid because a portion of the income was derived from the business of export. This was so because the tax was considered not to be a tax upon the source of the income, but a personal tax upon the taxpayer over whom the Government had full personal jurisdiction.

In *U. S. Glue Co.* v. *Oak Creek,* 247 U. S., 321, a tax levied by a State upon a domestic corporation measured by its entire net income, a portion of which was derived from interstate commerce, was sustained upon the authority of *Peck* v. *Lowe.* The tax was considered to be not a tax upon the source of the income, but a personal tax upon the taxpayer, over whom the State had full personal jurisdiction. The decision was expressly limited to "persons and corporations otherwise subject to the jurisdiction of the State."

In *Shaffer* v. *Carter,* 252 U. S., 37, a tax on the income of a non-resident derived from the conduct of an oil business in the State was sustained. Here the State had no personal jurisdiction over the taxpayer, but there was a large amount of property permanently in the State, and used in the business of producing oil therein. The State could tax the property and the business conducted therein, and this was in fact the source of the income taxed, which was held to be the fruit of the tree over which the State had full jurisdiction. It was contended in that case that the income was derived from interstate commerce. Shaffer owned and operated oil wells, and shipped the oil out of the State. The State had jurisdiction to tax the oil wells as property, and to tax the business of producing the oil. It had, therefore, jurisdiction over a taxable subject. The tax was not unreasonable in amount, and was in substance not more than a reasonable tax on a subject over which the State had full jurisdiction. The fact that the tax was measured by net income, which was in part derived from interstate commerce, was held not to invalidate the tax.

In *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S., 113, the plaintiff owned and operated a factory in Connecticut, from which it shipped goods in interstate commerce. A tax upon a portion of its net income was sustained upon the ground that it was in substance a tax upon property in the State, which was subject to the State's jurisdiction to tax. The Court expressly limited its decision to the facts in that case, which showed that the tax viewed as an ordinary property tax was not unreasonable.

In *Hump Hairpin Co.* v. *Emmerson,* 258 U. S., 290, the plaintiff had its factory and entire business in Illinois. The tax was sustained as in substance one on property subject to the State's jurisdiction.

We submit that the principle declared in these cases is that where there is jurisdiction over the subject taxed, and the tax is a reasonable one on this subject, it is not invalidated because it is measured by net income which is derived in part from a source which is not itself a subject of taxation.

It has not been held:

(1) That a tax is valid when levied with complete absence of jurisdiction over the subject taxed, because it is measured by net income.

(2) That the fact that a tax is measured by net income gives a State the power to tax the subject of interstate commerce.

(3) That jurisdiction over the subject taxed is not as essential in the case of a tax measured by net income, as in the case of a tax measured in any other way.

It has not been held that when the entire income is derived from interstate commerce, a State tax measured thereby upon a subject which the State has jurisdiction to tax is valid, although the ratio *decidendi* of the above cases would perhaps imply that this may be so. But that question is not involved in this case. The plaintiff's

contention is that the measure of the tax is immaterial because of entire absence of jurisdiction over the subject taxed. Concededly, there is no jurisdiction to tax the non-resident personally, and there is no jurisdiction to tax interstate commerce which the Court finds is the sole source of the income. Where, then, is the taxable subject? Clearly, it cannot be considered as equivalent to a tax on property, because of the State Court's finding that it is not, because of the provisions of the statute itself, and because of the gross disproportion between the amount of the tax and the value of property in the State.

The State Court, it is respectfully submitted, has confused the distinction between the subject of a tax and the measure of a tax.

It has been held that where a State has jurisdiction of the subject, a tax is not invalidated because it is measured by property not itself directly subject to tax, and also that where a tax is measured by and is in substance a tax on property subject to tax, it is not necessarily invalid because expressed to be a tax on a subject itself immune from taxation.

But this merely means that, looking through form to substance, the tax in each case was sustained because the State had jurisdiction to levy a tax upon the subject taxed.

That a tax on A., measured in a certain way, is valid, does not imply that a tax on B. measured in the same way is also valid, unless it is assumed that A. and B. are similarly situated with respect to the State's jurisdiction to tax. Thus, a State may tax its own residents upon their entire income from whatever source obtained, because it has personal jurisdiction over the taxpayer, and can treat the income tax as a personal tax on him. But it can only tax the non-resident on income derived from sources within the State, because while it has juris-

diction over the source of this part of the taxpayer's income, it has no personal jurisdiction over him.

For this reason the cases relied upon by the State Court are inapplicable. In the *United States Glue Company* case, the tax was on a domestic corporation; and the court held that a tax measured by net income, a portion of which was derived from interstate commerce, was valid. Here, the State had full personal jurisdiction over the subject taxed.

On the other hand, in *Shaffer* v. *Carter*, the tax was on a non-resident, measured by his net income from sources within the State. Here, the State had jurisdiction over the source of the income, which was in substance what was taxed. Obviously, the decision in the *American Glue Co.* case cannot be cited as holding that income from sources without the State could have been taxed in *Shaffer* v. *Carter*.

So, in *Hawley* v. *Malden*, 232 U. S., 1, it was held that Connecticut could tax its own citizens upon personal property owned by them and having a *situs* without its borders. But this could not be cited as authorizing a tax on a non-resident on property situated outside the State, as in *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S., 298.

The State Court argues that since a tax on the entire net income of a resident, a portion of which comes from interstate commerce, is valid, therefore a tax on so much of the income of a non-resident as is derived from interstate commerce is also valid. This, we submit, is a *non-sequitur*, and results from a failure to distinguish what is the subject taxed. In every case in which an income tax has been sustained, there has been jurisdiction over the subject taxed, either (1) personal, over the taxpayer, or (2) *in rem*, over the source of the income. Here, concededly, there is no personal jurisdiction over the taxpayer; concededly the sole source of the income is in-

terstate commerce; concededly the State has no jurisdiction to tax this interstate commerce. We submit that the total absence of jurisdiction over the subject taxed puts this case in an entirely different class from the cases relied upon by the State Court, in all of which jurisdiction over the subject taxed was clear.

None of these cases cited by the State Court announce a principle which tends to sustain the tax here in question. In all of them the taxing power had unquestioned jurisdiction to tax the subject matter, and it was held that the tax was not invalidated because the measure of the tax included matters which, considered as the direct subject of taxation, could not have been taxed. The distinction between the subject of the tax and the measure of the tax was pointed out in *Flint* v. *Stone Tracy Co.*, 220 U. S., 107, where, at pages 163 and 165, the Court said:

> "There is nothing in these cases contrary, as we shall have occasion to see, to the former rulings of this court which hold that where a tax is lawfully imposed upon the exercise of privileges within the taxing power of the State or Nation, the measure of such tax may be the income from the property of the corporation, although a part of such income is derived from property in itself non-taxable. The distinction lies between the attempt to tax the property as such and to measure a legitimate tax upon the privileges involved in the use of such property. * * * It is, therefore, well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is non-taxable."

Of course, if this tax could fairly be considered as a tax on income from property within the State, a differ-

ent question would arise. It is established that a State can tax as property the instrumentalities of interstate commerce having a *situs* within its borders, and that a State having jurisdiction of the subject, can lay a tax measured by net income, *a portion* of which is derived from interstate commerce. While it has not been held that a State having jurisdiction over the subject, can lay a tax measured by net income, *all* of which is derived from interstate commerce, it may be that if the tax here in question could be construed as a tax measured by income derived from property in the State which was subject to the State's taxing jurisdiction, it would be valid, although that income was derived entirely through the use of property in interstate commerce.

Plaintiff concedes that the State of Massachusetts can lawfully impose a tax upon the $500 worth of property that it has in the State of Massachusetts. It recognizes that the fact that this property is an instrumentality used in interstate commerce does not render it immune from ordinary property taxation. It may be that as the State has power to tax the property used in interstate commerce, it can tax the income derived from the use of that property, provided the tax is limited to income bearing a reasonable relation to the value of the property, so that it can be considered as in substance a tax upon the property, and not upon the business of interstate commerce. This question has not been squarely decided, and is not presented for decision in this case, because it is clear that this tax is not imposed on the income from the property in Massachusetts in such a way as to constitute in substance a tax upon that property. If the income subject to the tax of two and a half per cent. were apportioned entirely upon the relation that the property in Massachusetts, stipulated to be of the value of $500, bears to the total property of the plaintiff, or even to its total tangible property, it may be that this part of the tax could be construed as in substance a tax on property

in the State. We have shown above that this would apportion to the State of Massachusetts, according to the plaintiff's contention, $18 of income, and according to the State's finding, $30 of income. A tax of two and a half per cent. on this thirty dollars would not be an unreasonable tax, and might be sustained as in substance a tax upon the property, used in interstate commerce it is true, but still property in the State and subject to the State's taxing jurisdiction. But we submit that it is clear that this tax, which apportions total income of $15,370 from $500 worth of property, and imposes an income tax of $380, purporting to be upon the income derived from $500 worth of property, when it is conceded that the actual net income of the corporation amounted to only about five per cent. on its total property, is not and cannot be held in substance to be a tax upon the property or upon the income from the property. It is in fact and in substance as well as in form and measure a tax on interstate commerce, and therefore invalid.

POINT VII.

It is submitted that the judgments of the Supreme Judicial Court of Massachusetts should be reversed.

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JOHN G. PALFREY,
Counsel for Plaintiff-in-Error.

APPENDIX.

The present Massachusetts Tax Act here in question is printed in the Record (Case 103, pp. 31-40), and the applicable parts *supra*, pp. 2-5. The present Act superseded the Act of 1909, which had superseded the 1903 Act. In so far as they affected foreign corporations, the Acts of 1909 and 1903 are as follows:

(a) Acts of 1909, Part III, Chapter 490.

"Section 54. Every foreign corporation shall annually, within thirty days after the date fixed for its annual meeting, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare and file in the office of the Secretary of the Commonwealth, upon payment of the fee provided in Section 91 of Chapter 437 of the acts of the year 1903, a certificate signed and sworn to by its president, treasurer and by a majority of its board of directors, showing the amount of its authorized capital stock, and its assets and liabilities as of a date not more than 90 days prior to said annual meeting, in such form as is required of domestic business corporations under the provisions of section 45 of said chapter, and the change or changes, if any, in the other particulars included in the certificate required by section 60 of said chapter, made since the filing of said certificate or of the last annual report.

"Section 55. A certificate which is required to be filed by the preceding section shall be accompanied by a written statement under oath by an auditor, as provided in Section 47 of chapter 437 of the acts of 1903, except that such auditor shall in all cases be chosen by the board of directors. Before it is filed it shall be submitted to the commissioner of corporations who shall examine said certificate and shall as tax commissioner assess upon the corporation an excise tax in accord-

ance with the provisions of the following section. If he finds that the certificate is in compliance with the requirements of the preceding section, he shall indorse his approval thereon; but no certificate shall be filed until he has indorsed his approval thereon, and until the excise tax required by the following section has been paid to the treasurer and receiver general.

"Section 56. Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of $2,000."

(b) Acts of 1914, Chapter 724, Section 1.

"Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition."

(c) Acts of 1903, Chap. 437, Sec. 75.

"Every foreign corporation of the classes described in Section fifty-eight shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the Tax Commissioner of one hundredth of one per cent of the par value of its au-

thorized capital stock as stated in its annual certificate of condition; but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the Commonwealth during the preceding year; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

The foregoing section was amended by Acts of 1907, Chapter 578, to read as follows:

"Every foreign corporation of the classes described in section fifty-eight shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the Commonwealth, an excise tax to be assessed by the tax commissioner of one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

Supreme Court of the United States

OCTOBER TERM, 1924

No. 103 and No. 327

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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Supreme Court of the United States

OCTOBER TERM, 1924.

No. 103 and No. 327.

ALPHA PORTLAND CEMENT COMPANY,
PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

These are suits for the recovery of taxes assessed to the petitioner as a foreign corporation doing business in Massachusetts. Concededly that business was purely interstate. The corporation contends that for that reason the levying of the taxes in question was in contravention of provisions of the Constitution of the United States. The facts in each case are set out in an agreed statement. In both cases the state court held that the taxes were valid.

It is unnecessary to rehearse at length the nature

of the petitioner's business. It is a New Jersey corporation engaged in the manufacture and sale of cement. It has mills in several states from which cement is shipped to its customers. It has an office in Boston in charge of a district sales manager, with a clerk, which is used as headquarters by traveling salesmen employed by the petitioner, who solicit orders for cement throughout New England. Correspondence is conducted, orders made up, and records of shipments kept at the Boston office. Speaking generally, the petitioner's business in Massachusetts consists in negotiating sales and making deliveries of cement to customers there and in other New England States (Rec. No. 103, pp. 18, 19; Rec. No. 327, pp. 32, 33).

The petitioner has tangible property in Massachusetts consisting of office furniture valued at about $500 (Rec. No. 103, p. 19). Intangible assets having a situs in Massachusetts such that they might be subject to a property tax in that State are the corporate franchise employed in the Commonwealth and credits arising from the sale of cement to residents of Massachusetts (Rec. No. 327, p. 33). Annual gross receipts assignable to Massachusetts, as shown by the petitioner's returns, in 1920 amounted to $424,982.70 and in 1921 to $343,204.60 (Rec. No. 103, folio p. 15; Rec. No. 327, p. 20).

The taxes assailed were excises for the years 1921 and 1922 assessed to the petitioner under G. L., c. 63, and St. 1921, cc. 361 and 493. G. L., c. 63, embodies the Massachusetts corporation tax law. The taxes assessed thereunder were $800.06 for 1921 and $590.54 for 1922 (Rec. No. 103, p. 20; Rec. No. 327,

p. 35). St. 1921, c. 361, imposing a minimum tax under G. L., c. 63, for the year 1921, did not affect the amount of the tax assessed to the petitioner for that year (Rec. No. 103, p. 22). St. 1921, c. 493, imposed an additional tax for the year 1921, under which a tax was assessed to the petitioner amounting to $0.39 (Rec. No. 103, p. 20).

THE MASSACHUSETTS CORPORATION TAX LAW.

The principle and general scheme of the Massachusetts corporation tax law is carefully explained in the state court's opinion in the first of the two cases, No. 103 of 1924. Relevant parts of the statutes are set out in an appendix to that opinion, and are annexed to this brief.

Provision is made for the taxation of domestic and foreign business corporations in sections 30 to 52 of G. L., c. 63, sections 39 to 43 relating particularly to foreign corporations. These provisions, first enacted in Gen. St. 1919, c. 355, are a considerable departure from earlier corporation tax laws. They provide for the levy of an excise on both domestic and foreign business corporations doing business in the Commonwealth, with respect to such business. The excise in both cases is the sum of two percentages. It is measured by two factors, one of which relates to property in the Commonwealth and the other to net income derived from business therein. This excise tax is in place of any other tax on property, except real estate and machinery, which alone, when owned by domestic or foreign business corporations, are subject to local taxation. G. L., c. 59, § 5, cl. 16th.

As to a foreign corporation (section 39) the excise is equal to the sum of "(1) an amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the Commonwealth" and "(2) an amount equal to two and one-half per cent of that part of its net income . . . which is derived from business carried on within the Commonwealth," with a further provision for a minimum tax which did not enter into the computation of the taxes assessed to the petitioner. "Corporate excess employed within the Commonwealth" by a foreign corporation is defined by section 30, clause 4, to be such proportion of the fair cash value of all its shares of capital stock on April first as the value of its real and personal assets employed in business within the Commonwealth bears to the value of its total assets on that date, less the value of (*a*) real estate and machinery owned by it within the Commonwealth subject to local taxation, and (*b*) securities held within the Commonwealth the income of which, if held by a natural person, would not be subject to taxation. "Net income" is defined by section 30, clause 5, to mean generally as to a foreign corporation the net income for the taxable year (preceding fiscal year) required to be returned to the Federal Government, less interest received on bonds, notes and certificates of indebtedness of the United States.

A statutory method for determining the net income of a foreign corporation derived from business carried on within the Commonwealth is provided by section 41. This method requires the allocation of gains from sale of capital assets and interest according to the source from which they are derived, and

the allocation of the remainder, in the case of a foreign business corporation carrying on business within and without the Commonwealth, according to the rule stated in section 38, by dividing the remainder into three equal parts, of which one-third is to be multiplied by the ratio of the corporation's tangible property situated within the Commonwealth to the value of such property wherever situated, another third is to be multiplied by the ratio of the expenditure for the taxable year for wages, salaries and commissions to employees assignable to the Commonwealth to the total of such expenditure, and the remaining third is to be multiplied by the ratio of the gross receipts for the taxable year from business assignable to the Commonwealth to the gross receipts from all business. It is provided by section 42 that a foreign corporation carrying on part of its business outside the Commonwealth may refuse to accept determination of the amount of business assignable to the Commonwealth by the allocating method provided in section 41, by notifying the Commissioner of Corporations and Taxation and filing a statement showing the amount of its annual net income derived from business carried on within the Commonwealth, from which the Commissioner is required to determine the proportion of the net income received from business carried on within the Commonwealth. Section 43 provides for a credit to the corporation of five per cent of the dividends paid during the previous calendar year to inhabitants of Massachusetts.

The method for determining the value of the corporate excess employed within the Commonwealth by a foreign corporation, as has been stated, is pro-

vided by section 30, clause 4. There is however no provision giving a rule for determining the value of assets employed in business within the Commonwealth, upon which the value of the corporate excess employed within the Commonwealth is made to depend, and in the case of intangible assets such valuation is difficult except by an allocating rule. But section 47 (Gen. St. 1919, c. 355, §§ 7, 22) authorizes the Commissioner to make such reasonable rules and regulations as he may deem necessary for carrying out the provisions of sections 30 to 51, inclusive; and pursuant to the authority so granted the following general ruling for allocating the value of intangible assets was made by the Commissioner and has since been continuously in force:

"2505. Ordinarily, such proportion of an intangible asset employed in business will be deemed to be employed in business within Massachusetts as that portion of the remainder of income allocable in Massachusetts under the provisions of section 19 of the act (G. L., c. 63, § 41) bears to the total of said remainder. If, however, because of the peculiar circumstances of any particular case such method of apportionment does not fairly reflect the proportion of an asset employed in business in Massachusetts, the corporation may submit its reasons for requesting determination by another method. The department also reserves the right in such cases to make the apportionment by another rule, even though the corporation does not request determination by another method; but in such event the corporation will be notified." (Rec. No. 327, p. 34.)

The effect of this ruling, it will be observed, is to apply to the valuation of intangible assets employed within the Commonwealth the same allocating method which the statute provides for the deter-

mination of net income derived from business within the Commonwealth; and provision is made, as in section 42, for the employment of another method, if requested by the corporation, where the allocating method is thought to be unfair in its application.

In this corporation tax law, enacted in 1919 and now embodied in G. L., c. 63, the Legislature has attempted to adopt a general principle whereby domestic and foreign corporations should be treated with fairness on the same footing as to taxation, avoiding on the one hand a basis for taxation of foreign corporations offensive to the limitations imposed by the Constitution of the United States and on the other hand the preferences in favor of foreign corporations which were inherent in the earlier system. This law places both domestic and foreign corporations on common ground as to taxation except so far as essential differences require different treatment in details. As to both domestic and foreign corporations one factor of the tax is net income derived from business carried on within the Commonwealth. As to both the other factor of the tax is corporate excess, that is, property, determined after deducting the value of property locally taxed in Massachusetts and securities the income of which if received by an individual resident would not be taxable, with certain exceptions, while the value of property outside the jurisdiction is excepted, in the case of foreign corporations, by the provision for a proportion, and in the case of domestic corporations, as to real estate and tangible personal property, by the provision for a deduction of its value (G. L., c. 63, § 30, cl. 3, and § 32). Both are

exempt from payment of local taxes except on real estate and machinery.

See Opinion of the State Court in No. 103 of 1924.

Judson Freight Forwarding Co. *v.* Commonwealth, 242 Mass. 47.

The present tax law differs essentially from the earlier tax law respecting foreign corporations. The earlier law (St. 1903, c. 437, § 75, and St. 1909, c. 490, pt. III, §§ 54–56) imposed an excise on foreign corporations measured by the amount of capital stock, with no provision for apportionment depending on the amount of business done in the State. It was in the nature of a license fee for the privilege of doing intrastate business. The right to do business depended upon payment of the tax, and prohibitive penalties followed failure to comply with the statutes and to make the specified payment. For that reason it was held that those statutes did not apply to corporations engaged solely in interstate commerce at a place of business within the Commonwealth.

Attorney General *v.* Electric Storage Battery Co., 188 Mass. 239.

Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381.

S. S. White Dental Manuf. Co. *v.* Commonwealth, 212 Mass. 35.

Marconi Wireless Telegraph Co. *v.* Commonwealth, 218 Mass. 558, 561, 563–567.

Old Dominion Co. *v.* Commonwealth, 237 Mass. 269, 276.

Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68.
International Paper Co. *v.* Massachusetts, 246 U. S. 135.
Cheney Brothers Co. *v.* Massachusetts, 246 U. S. 147.

The present tax law imposes an excise on foreign corporations for the privilege of doing business in Massachusetts under the protection of its laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done within the State. Payment of the tax is not made a condition precedent to the doing of business. Collection of the tax is to be made by ordinary methods. There is no discrimination either against foreign corporations or against interstate commerce.

See Opinion of the State Court in No. 103 of 1924.
Judson Freight Forwarding Co. *v.* Commonwealth, 242 Mass. 47.
Cf. Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 384.

The additional tax imposed by St. 1921, c. 493, was an excise for the year 1921 alone, levied on both domestic and foreign business corporations, of three-fourths of one per cent of their net income for the preceding fiscal year apportioned to the Commonwealth as provided by the act.

Computation and Assessment of the Taxes in Controversy.

The taxes for 1921 and 1922 under G. L., c. 63, were computed according to the terms of the statute and the ruling referred to above. The computation by which the amount equal to two and one-half per cent of the net income derived from business carried on within the Commonwealth was determined was made in accordance with the requirements of the statute, and the computation by which the amount equal to five dollars per thousand upon the value of the corporate excess employed within the Commonwealth was determined was made in accordance with the provisions of the statute and the Commissioner's ruling. Details of the calculations appear in the record, but need not be recited here. For the year 1921 the Commissioner determined the value of the corporate excess employed within the Commonwealth to be $84,001.21 out of a total value of assets amounting to $21,076,282.74, and the net income derived from business carried on within the Commonwealth during the previous year to be $15,370.06 out of a total net income amounting to $1,148,041.70 (Rec. No. 103, folio pp. 13, 15, p. 14). For the year 1922 he determined the value of the corporate excess employed within the Commonwealth to be $75,932.08 out of a total value of assets amounting to $21,406,098.39, and the net income derived from business carried on within the Commonwealth during the previous year to be $9,202.53 out of a total net income amounting to $707,577.98 (Rec. No. 327, pp. 17, 19, 26, 27, 34, 35).

The petitioner at no time requested the Commissioner to determine the part either of the net income or of the intangible assets assignable to Massachusetts by any other method than the allocating method provided by the statute and the ruling respectively (Rec. No. 327, p. 34).

In the case of the 1921 tax the part measured by net income was $380.05 and the part measured by corporate excess was $420.01, making a total of $800.06 (Rec. p. 103, p. 14). In the case of the 1922 tax the part measured by net income was $187.91 and the part measured by corporate excess was $379.66, and there was a further item of $22.97 for interest, making a total of $590.54 (Rec. No. 327, p. 35).

The tax bill for the additional tax assessed under St. 1921, c. 493, amounting to $0.39, shows that it was based on a percentage of net income apportioned to the Commonwealth amounting to $52.63 (Rec. p. 103, p. 15). The computation by which the apportionment was determined is not given.

In the first of the two cases, involving the 1921 taxes, it was agreed that the amount of the tax assessed was not questioned and that no question of valuation was involved (Rec. No. 103, p. 20). In the second case, involving the 1922 tax, it was agreed for the purposes of the case that the mathematical computations of the Commissioner were correct, and that the valuation of specific items of assets was fair (Rec. 327, pp. 35, 36).

ARGUMENT.

I.

MATTERS SETTLED BY THE DECISIONS OF THE MASSACHUSETTS COURT.

The construction put upon a state statute by the highest court of the State must be accepted by the courts of the United States and be regarded as a part of the statutory provision, when they are called upon to determine whether it violates any right secured by the Federal Constitution. But the decision of a state court respecting the description or characterization of a statute and its operation and effect, when the statute is challenged on the ground that it is repugnant to the Federal Constitution, will not necessarily control.

Morley *v.* Lake Shore Ry. Co., 146 U. S. 162, 166–167.

Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61, 73.

United States Express Co. *v.* Minnesota, 223 U. S. 335, 342, 346.

St. Louis S. W. Ry. *v.* Arkansas, 235 U. S. 350, 362.

Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292.

Farncomb *v.* Denver, 252 U. S. 7, 10.

Lacoste *v.* Dept. of Conservation of Louisiana, U. S. Sup. Ct., decided January 7, 1924.

In the light of these principles certain matters decided by the state court seem to be settled.

A.

The Taxes complained of were Excises and not Property Taxes.

In Judson Freight Forwarding Co. *v.* Commonwealth, 242 Mass. 47, 51, the state court decided that the tax imposed by Gen. St. 1919, c. 355, now codified in G. L., c. 63, was an excise and not a property tax. This view of the tax law is reaffirmed in the opinion of the court in No. 103 of 1924. If it were not an excise it would not be in conformity with the requirements of the Massachusetts Constitution. It has long been the legislative policy of Massachusetts to levy excises instead of property taxes on corporate franchises and corporate business.

> Portland Bank *v.* Apthorp, 12 Mass. 252.
> Commonwealth *v.* People's Five Cents Savings Bank, 5 Allen, 428, 431.
> Commonwealth *v.* Hamilton Mfg. Co., 12 Allen, 298, 300.
> S. S. White Dental Manuf. Co. *v.* Commonwealth, 212 Mass. 35, 38–41.
> Eaton, Crane & Pike Co. *v.* Commonwealth, 237 Mass. 523, 526–528.

The reasons for holding the tax imposed by the statute of 1919 to be an excise were stated by the court in Judson Freight Forwarding Co. *v.* Commonwealth as follows:

"It is named an 'excise' in the statute. The declared purpose of the Legislature is accepted unless inconsistent with

the meaning and effect of the enactment. . . . It is levied in 'respect to the carrying on or doing of business by it within the Commonwealth.' It is an excise for the commodity or privilege of having a place of business in Massachusetts with the protection of our laws and the financial, commercial and other advantages appertaining thereto."

This court has on several occasions approved of the conclusion of the state court with respect to earlier corporation tax laws that the taxes imposed thereby were excises and not property taxes.

> Provident Institution *v.* Massachusetts, 6 Wall. 611, 623.
> Hamilton Co. *v.* Massachusetts, 6 Wall. 632.
> Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 84.

So far as the question is one of legislative intent the decision of the state court on the point would seem to be final. If the question is a broader one it is submitted that the decision of the state court was right and in accordance with the views of this court as expressed in earlier cases.

For similar reasons the tax imposed by St. 1921, c. 493, was an excise. It is called an "excise tax" and is similar in nature to the tax imposed by Gen. St. 1918, c. 253, which in Eaton, Crane & Pike Co. *v.* Commonwealth, 237 Mass. 523, 526–528, the court held to be an excise tax.

Being excises these taxes are not taxes *on* property or net income, but taxes *measured by* property and net income, used in or derived from business done in Massachusetts.

B.

The Statutes by their Terms are Applicable to the Petitioner.

G. L., c. 63, § 30, cl. 2, defines "foreign corporation" to mean "every corporation, association or organization established, organized or chartered under laws other than those of the Commonwealth, for purposes for which domestic corporations may be organized under chapter one hundred and fifty-six, which has a usual place of business in this Commonwealth" or is engaged there in construction work. By G. L., c. 156, § 2, that chapter, entitled "business corporations," is made applicable to all domestic corporations having a capital stock established either by general or special law for the purpose of carrying on business for profit, except corporations organized for the purpose of doing a banking business, insurance companies, public service corporations and other corporations of a similar nature. G. L., c. 63, § 39, imposes an excise on "every foreign corporation" "with respect to the carrying on or doing of business by it within the Commonwealth."

The petitioner is a business corporation, carrying on business for profit. It "has a usual place of business in this Commonwealth." During the taxable period it was doing business in Massachusetts, although that business was interstate commerce.

McCall *v.* California, 136 U. S. 104.
International Harvester Co. *v.* Kentucky, 234 U. S. 575.
Shaffer *v.* Carter, 252 U. S. 37, 57.

The business which the petitioner was doing in Massachusetts yielded, according to its returns, annual gross receipts assignable to Massachusetts of $424,982.70 in 1920 and $343,204.60 in 1921.

The petitioner therefore comes precisely within the express terms of G. L., c. 63. The state court has so declared in its opinion reported in No. 103 of 1924:

"As matter of verbal construction it is plain that the tax law includes a foreign corporation such as the petitioner. Confessedly the petitioner 'has a usual place of business in this Commonwealth' and is actually carrying on business here. The petitioner comes within the description of s. 30, 2, where foreign corporation is defined as including every corporation 'chartered under laws other than those of the Commonwealth for purposes for which domestic corporations may be organized under chapter one hundred fifty-six, which has a usual place of business in this Commonwealth'."

See also Judson Freight Forwarding Co. *v.* Commonwealth, 242 Mass. 47, 51.

It is equally plain that the petitioner comes within the description of St. 1921, c. 493, which is expressly made applicable to "every corporation subject to the provisions of sections thirty to sixty, inclusive, of chapter sixty-three of the General Laws."

Whether the petitioner is subject to these tax laws depends, however, upon the further question whether the statutes so construed would be constitutional. As the state court said:

"Whether these statutory words are to be interpreted so as to include foreign corporations engaged here exclusively in interstate commerce depends upon the further inquiry whether as thus construed the statute would be constitutional."

See also Attorney General *v.* Electric Storage Battery Co., 188 Mass. 239, 240, 241.
Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381, 390.

Considering that question the court concluded:

"The tax statute, therefore, is interpreted as applying to a corporation engaged in business within the Commonwealth as is the petitioner."

The question whether the corporation tax law of Massachusetts, as applied to a corporation doing a business in this Commonwealth which is exclusively interstate commerce, is constitutional, is the principal question which must be considered here.

C.

The Commissioner in Computing the Taxes in Controversy followed the Terms of the Statutes.

Before approaching the main question of the constitutionality of the statutes as applied to the petitioner it should be pointed out that there can be no controversy before this court but that the method which the Commissioner pursued in determining and assessing the taxes in controversy was in compliance with the statutes. The record shows that the Commissioner in determining both the value of the corporate excess employed by the petitioner within the Commonwealth and in determining the part of the petitioner's net income derived from business carried on within the Commonwealth, for the purpose of assessing the 1921 and 1922 taxes under G. L., c. 63, fol-

lowed the directions contained in the statutes and in the Commissioner's general ruling. It is agreed that the computations of the Commissioner were correctly made and that his valuation of specific items of assets was fair. It is not contended that the petitioner made any request of the Commissioner to determine either the value of the intangible assets employed within the Commonwealth or the part of the net income derived from business carried on within the Commonwealth by any alternative method. With regard to the assessment of the 1922 tax the court said in the opinion in No. 327 of 1923:

"Without pursuing the details of the method of computation to ascertain these two elements, it is enough to say that it is in conformity to the statute. This conclusion finds confirmation in the fact that the petitioner failed to exercise the option, extended to it by the ruling of the Commissioner already quoted, of requesting an apportionment by some other method."

The method by which, acting under St. 1921, c. 493, the Commissioner determined the petitioner's net income apportioned to the Commonwealth to be $52.63 and the tax to be $0.39 is not stated. It is not, however, contended that the Commissioner in making that determination and assessment did not comply with the terms of the statute.

We come, therefore, now directly to the question whether or not the statutes in question so construed and applied are constitutional.

II.

THE MASSACHUSETTS CORPORATION TAX LAW IN ITS APPLICATION TO THE PETITIONER IS CONSTITUTIONAL.

One of the chief sources of revenue available to a State is the taxation of corporations doing business within its borders. Various systems of taxation have been devised by different States at different times of which some have been sustained and others have fallen before the test of constitutionality when brought to the bar of this court. On account of the variety of methods employed in attempts to levy taxes which will cover the corporate field as widely as possible and yet be valid, it is somewhat difficult to deduce the guiding principles on which the decisions rest. The following observations, however, seem to be justified.

Corporation taxes under state laws may be classified according to the measure or kind of tax as taxes on or measured by (1) capital stock, (2) gross receipts, (3) property, and (4) net income. They may be unconstitutional because of either (1) interference with interstate (or foreign) commerce, or (2) violation of the Fourteenth Amendment. Interference with interstate commerce is found where the tax is of a kind which in the court's view imposes a direct burden on such commerce, or in some way discriminates against it. Violation of the Fourteenth Amendment is a ground of invalidity where it is attempted to tax a foreign corporation with respect to property or business done outside the State, or in

such a way as to discriminate against that class of corporations.

The earlier foreign corporation tax law of Massachusetts measured the amount of the tax by the amount of capital stock, but with a maximum limit of $2,000. This law was held to be inapplicable to corporations engaged exclusively in interstate commerce because if so applied the tax would be a direct burden on such commerce. As to corporations engaged in local business as well, the law was construed as imposing a reasonable license fee for the privilege of doing that local business, which did not directly burden interstate commerce, or constitute an attempt to tax property beyond the jurisdiction of the State, or result in undue discrimination against such corporations, and was therefore held to be constitutional.

Attorney General *v.* Electric Storage Battery Co., 188 Mass. 239.

Baltic Mining Co. *v.* Commonwealth, 207 Mass. 381.

S. S. White Dental Manuf. Co. *v.* Commonwealth, 212 Mass. 35.

Marconi Wireless Tel. Co. *v.* Commonwealth, 218 Mass. 558.

Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68.

Cheney Brothers Co. *v.* Massachusetts, 246 U. S. 147.

But St. 1914, c. 724, § 1, removing the maximum limit, was declared unconstitutional both as placing a prohibited burden on interstate commerce and as

laid on property of a foreign corporation located and used beyond the jurisdiction of the State.

International Paper Co. *v.* Massachusetts, 246 U. S. 135, 145.

In this decision the principles laid down in Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, and Looney *v.* Crane Co., 245 U. S. 178, were reaffirmed. In Western Union Telegraph Co. *v.* Kansas the principle is stated in these words:

"If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business.

. . . . . .

Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent of its authorized capital, representing, as that capital clearly does, all of its business and property, both within and outside of the State, a condition of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the State, but a burden and tax on the company's interstate business and on its property located or used outside of the State."

On the other hand taxes on capital stock have been sustained as being in effect taxes on property, where in the court's view, no undue burden on interstate commerce was imposed.

Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530.

Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18.

Similar considerations have governed the decision of cases involving taxes on or measured by gross receipts on corporations engaged in interstate commerce. In several cases such taxes have been sustained.

State Tax on Railway Gross Receipts, 15 Wall. 284.
Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217.
United States Express Co. *v.* Minnesota, 223 U. S. 335.
Pullman Co. *v.* Richardson, 261 U. S. 330.

In other cases such taxes have been held unconstitutional as a direct burden on interstate commerce.

Galveston, Harrisburg & San Antonio Ry. Co. *v.* Texas, 210 U. S. 217.
Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292.

One part of the tax levied by G. L., c. 63, purports to be measured by the "value of the corporate excess employed . . . within the Commonwealth," and the other part by "that part of its net income . . . which is derived from business carried on within the Commonwealth." The tax levied by St. 1921, c. 493, purports to be measured by "net income . . . apportioned to this Commonwealth." "Corporate excess employed within the Commonwealth" by a foreign corporation, as we have seen, is defined by G. L., c. 63, § 30, cl. 4, to be such proportion of the fair cash value of all its shares of capital stock as

the value of its real and personal assets employed in business within the Commonwealth bears to the value of its total assets, less the value of (*a*) real estate and machinery owned by it within the Commonwealth subject to local taxation, and (*b*) securities held within the Commonwealth the income of which, if held by a natural person, would not be subject to taxation. The fair cash value of all the shares constituting the capital stock of a corporation is in substance and effect the market value of all its assets including its corporate franchise, and the proportionate part of such value equal to the ratio of its real and personal assets employed in business within the Commonwealth to the value of its total assets is the value of its real and personal assets, as part of a going concern, employed in business within the Commonwealth. The value of the corporate excess employed within the Commonwealth is therefore the value of property employed there.

We assume, for the purposes of present discussion, that the amounts computed as the respective measures from which the taxes in controversy were assessed were, as the statutes provide, the value of property employed within the Commonwealth and net income from business therein, leaving for later consideration any question involved in such assumption. The discussion therefore will require an analysis of decisions relating to taxes on or measured by property or net income. It will naturally be divided into two branches corresponding to the two parts of the tax.

A.

The Tax, so far as Measured by the Value of the Corporate Excess employed within the Commonwealth, is valid as to Foreign Corporations Engaged Solely in Interstate Commerce.

That part of the tax imposed on a foreign corporation by G. L., c. 63, which is measured by the value of the corporate excess employed within the Commonwealth differs fundamentally from the tax imposed by earlier statutes. It differs from a tax measured by the par value of the capital stock of a foreign corporation in that the basis of the measure is the market value of its assets and not the nominal value of its capital stock, and in that only a proportionate part of such market value corresponding to the value of assets within the Commonwealth is taken. It is a tax measured substantially by the value of the property of a foreign corporation, both real and personal, tangible and intangible, including the franchise, employed within the Commonwealth, less deductions on account of property locally taxed therein and certain securities held there. It is laid without discrimination either against foreign corporations or against interstate commerce.

The record shows that the petitioner had in Massachusetts tangible personal property valued at about $500, and intangible personal property, consisting of its corporate franchise employed in the Commonwealth and credits arising from the sale of cement to residents of Massachusetts, of substantial value.

The petitioner's contention as to this branch of the tax is that the value of all the assets of a foreign corporation, including intangible assets and the value of its franchise, employed within the Commonwealth, may not properly be used as the basis of a tax levied on a foreign corporation engaged exclusively in interstate commerce, both because the resulting tax imposes a direct burden on interstate commerce, and because it violates the provisions of the Fourteenth Amendment.

It is well established that property of a non-resident located within a State is subject to taxation by it, although the property is used exclusively in interstate commerce, except when it is actually in the course of an interstate journey, if the tax is laid without discrimination.

Brown *v.* Houston, 114 U. S. 622.
Coe *v.* Errol, 116 U. S. 517, 525, 528.
Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 25.
Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688.
Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194.
United States Express Co. *v.* Minnesota, 223 U. S. 335, 344.
Bacon *v.* Illinois, 227 U. S. 504.
Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450, 453.
Pullman Co. *v.* Richardson, 261 U. S. 330, 338.

In the dissenting opinion of Mr. Justice Brandeis in Texas Transport & Terminal Co. *v.* New Orleans, U. S. Sup. Ct., February 18, 1924, he says:

"It is settled law that interstate commerce is not directly burdened by a tax imposed upon property used exclusively in interstate commerce, Transportation Co. *v.* Wheeling, 99 U. S. 273, 284; Dominion Steamship Co. *v.* Virginia, 198 U. S. 299, 306."

Apparently the petitioner concedes the application of this rule to tangible personal property, but contends that the rule is otherwise with respect to intangible assets such as a corporate franchise and credits due from residents.

So far as the franchise is concerned the point seems to be concluded by the decisions of this court. In Atlantic & Pacific Tel. Co. *v.* Philadelphia, 190 U. S. 160, the court stated as a proposition so often adjudicated as to be no longer open to discussion that " the franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided at least the franchise is not derived from the United States."

See also Horn Silver Mining Co. *v.* New York, 143 U. S. 305.
Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 696.

The objection to a tax on credits due from residents to non-residents may be based upon the contention either that intangible property is not subject to the foregoing rule or that a tax on such credits is

in violation of the Fourteenth Amendment. As to the second point it is submitted that the petitioner is concluded by numerous decisions sustaining state taxation of credits due to non-residents.

New Orleans *v.* Stempel, 175 U. S. 309, 320, *et seq.*
Bristol *v.* Washington County, 177 U. S. 133, 145.
Board of Assessors *v.* Comptoir National D'Escompte, 191 U. S. 388.
Metropolitan Life Ins. Co. of New York *v.* New Orleans, 205 U. S. 395.
Liverpool, etc., Ins. Co. *v.* Orleans Assessors, 221 U. S. 346, 354.
Shaffer *v.* Carter, 252 U. S. 37, 52.

The fact that such credits arise from and are used exclusively in interstate commerce, it is submitted, makes no difference. The rule with respect to the taxation of property used in interstate commerce does not distinguish between tangible and intangible property. The validity of the tax does not depend on the connection of the property with some local business but on the remoteness of any burden or effect upon interstate commerce.

See Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530.
Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688.
Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 222.

Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450, 456.
Pullman Co. *v.* Richardson, 261 U. S. 330.

If a tax on tangible and intangible assets including the corporate franchise of a foreign corporation employed in a State, although employed exclusively in interstate commerce, is valid, an excise tax measured by such property should also be valid. A tax measured by property may be valid when a tax on the property itself would be invalid, as the court stated in Flint *v.* Stone Tracy Co., 220 U. S. 107, 165, and again in Baltic Mining Co. *v.* Massachusetts, 231 U. S. 68, 87; but the converse is not true. This court has on several occasions held that such a tax is in effect a tax on property and therefore in no respect repugnant to the Federal Constitution.

In Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530, 552, a statute imposed a tax on the plaintiff measured by a portion of the fair cash value of its capital stock proportional to the ratio of the length of its lines in Massachusetts to the length of all its lines, less the value of its real estate and machinery subject to local taxation within the State. The court held that the tax was an excise measured by property within the Commonwealth, and was valid. On this point the court said:

"The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the country is made the basis for ascertaining the value of that property.

In Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 25, a tax assessed upon such proportion of the company's capital stock as the number of miles of railroad over which its cars were run in the State bore to the whole number of miles was held to be valid as in effect a tax on the plaintiff's property within the State. The court said in the opinion:

"The tax now in question is not a license tax or a privilege tax; it is not a tax on business or occupation. The tax is imposed equally on corporations doing business within the State, whether domestic or foreign, and whether engaged in interstate commerce or not. The tax on the capital of the corporation, on account of its property within the State is, in substance and effect, a tax on that property."

In Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 696, 698, 700, the court said:

"But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment.

. . . . . .

. . . Being thus brought within the rule, the tax becomes substantially a mere tax on property and not one imposed on the privilege of doing interstate business. The substance and not the shadow determines the validity of the exercise of the power.

. . . . . .

In the case before us, the tax was graduated according to the amount and value of the property measured by miles, and was in lieu of taxes levied directly on the property. In marking the distinction between the power over commerce and municipal power, literal adherence to particular nomenclature should not be allowed to control construction in arriving at the true intention and effect of state legislation."

See also United States Express Co. *v.* Minnesota, 223 U. S. 335.
Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450.
Pullman Co. *v.* Richardson, 261 U. S. 330.
12 California Law Review, 39–44.

In the opinion in No. 327 of 1923 the state court said on this point:

"The former decision rested in its ultimate analysis upon the theory that under the statute the excise might be measured in part upon intangible assets of the petitioner having a situs in this Commonwealth and arising exclusively from the conduct of its interstate business. We understand that credits due from residents within this Commonwealth to non-residents may be made the subject of direct property taxation here. . . . The source from which such credits arise is not material. They are not immune from taxation because coming into existence through the transaction of interstate commerce. That being so it would seem that such credits may be used as

a measure of an excise levied indifferently upon all corporations under a general law."

Accordingly it is submitted that the first part of the tax, measured by the value of the corporate excess employed within the Commonwealth and making no discrimination against foreign corporations or interstate commerce, as applied to a foreign corporation engaged exclusively in interstate commerce, is constitutional and valid.

B.

The Tax, so far as Measured by Net Income derived from Business within the Commonwealth, is valid as to Foreign Corporations Engaged Solely in Interstate Commerce.

That part of the tax imposed on a foreign corporation by G. L., c. 63, which is measured by the part of its net income derived from business carried on within the Commonwealth is wholly different from any corporation excise tax imposed by Massachusetts laws prior to the statute of 1918. It is a tax measured by net income from business transacted in Massachusetts which, although derived in the present instance solely from interstate commerce, is laid without discrimination against foreign corporations or against interstate commerce. Net income from business in Massachusetts is used as a measure applicable to all corporations alike.

The record shows that the petitioner received annual gross receipts from business done in Massachusetts amounting to $424,982.70 in 1920 and $343,-

204.60 in 1921. The amount of the net income earned from that business in those respective years was determined by the Commissioner according to the statutory rule to be $15,370.06 in 1920 and $9,202.53 in 1921.

The petitioner's contention as to this branch of the tax is that a tax on or measured by net income is invalid where that income is earned exclusively in interstate commerce, although the basis of the tax is income earned within the State, because it constitutes a direct burden on such commerce, and because when levied on a foreign corporation it violates the provisions of the Fourteenth Amendment.

As to the latter contention little needs to be said. The petitioner, it is submitted, is plainly concluded by decisions of this court holding that the income of a non-resident is subject to taxation within the State where it was earned or accrued.

> Shaffer *v.* Carter, 252 U. S. 37.
> Travis *v.* Yale & Towne Manuf. Co., 252 U. S. 60.

Consideration of the other proposition, namely, that such a tax constitutes a direct interference with interstate commerce and is therefore unconstitutional, requires some examination of recent decisions of this court. These decisions when analyzed, it is submitted, will show that a distinction is to be made between taxes on or measured by gross receipts and taxes on or measured by net income, and that taxes of the latter sort measured by net income earned within the State, where there is no discrimination

against and no obstruction of interstate commerce, are valid, although the income is derived from interstate commerce, because it is thought that such commerce is affected only indirectly and remotely by such a tax. The following decisions should be reviewed in this connection:

Peck & Co. *v.* Lowe, 247 U. S. 165, 174, 175.
United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 326–329.
Shaffer *v.* Carter, 252 U. S. 37, 57.
Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 119, 120.
Atlantic Coast Line *v.* Daughton, 262 U. S. 413, 416, 420.

In Peck & Co. *v.* Lowe the plaintiff was a domestic corporation chiefly engaged in buying goods in the several States, shipping them to foreign countries and there selling them. A Federal income tax was levied under the act of October 3, 1913, on its total net income. The question in controversy was concerning the validity of so much of the tax as was based on the income from foreign commerce. The court held that the tax was valid. Their reasons, as stated in the opinion, were as follows:

"The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see Stanton *v.* Baltic Mining

Co., *supra*, p. 113), it is both nominally and actually a general tax. It is not laid on income from exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed — the net income — is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation."

In United States Glue Co. *v.* Oak Creek the plaintiff was a domestic corporation in the State of Wisconsin engaged in manufacturing and selling its product throughout the state and in other states and foreign countries. A tax was imposed upon its net income under the Wisconsin income tax law. The question considered by the court was " whether a State, in levying a general income tax upon the gains and profits of a domestic corporation, may include in the computation the net income derived from transactions in interstate commerce without contravening the commerce clause of the Constitution of the United States." The court sustained the tax on the ground that a tax on, or measured by, net income,

like a tax on property, where the net income is derived from interstate commerce or the property is engaged in interstate commerce, does not, where there is no discrimination, directly burden interstate commerce.

The reasons given by the court are quoted at length:

"It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule. . . .

. . . . . .

The correct line of distinction is so well illustrated in two cases decided at the present term that we hardly need go further. In Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, we held that a state tax upon the business of selling goods in foreign commerce, measured by a certain percentage of the gross transactions in such commerce, was by its necessary effect a tax upon the commerce, and at the same time a duty upon exports, contrary to §§ 8 and 10 of Article I of the Constitution, since it operated to lay a direct burden upon every transaction by withholding for the use of the State a part of every dollar received. On the other hand, in Peck & Co. *v.* Lowe, *ante*, 165, we held that the Income Tax Act of October 3, 1913, c. 16, § 2, 38 Stat. 166, 172, when carried into effect by imposing an assessment upon the entire net income of a corporation, approximately three-fourths of which was derived from the export of goods to foreign countries, did not amount to laying a tax or duty on articles exported within the meaning of Art. I, § 9, cl. 5 of the Constitution. The distinction between a direct and an indirect burden by way of tax or duty was developed, and it was shown that an income tax laid generally on net incomes, not on income from exportation because of its source or in the way of discrimination, but just as it was

laid on other income, and affecting only the net receipts from exportation after all expenses were paid and losses adjusted and the recipient of the income was free to use it as he chose, was only an indirect burden.

The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal constitution because they happen to be engaged in commerce among the States."

In Shaffer *v.* Carter the plaintiff, a citizen and resident of Illinois, was engaged in the oil business in Oklahoma, having purchased, owned, developed and operated a number of oil and gas mining leases and being the owner in fee of certain oil producing land in that state. From the properties thus owned

and operated he received a net income on which he was assessed an income tax, which the defendant was proceeding to collect. The court held that the tax was constitutional. Replying to the argument that it constituted a burden on interstate commerce, the court said:

"It is urged that, regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. U. S. Glue Co. *v.* Oak Creek, 247 U. S. 321. Compare Peck & Co. *v.* Lowe, 247 U. S. 165."

In Underwood Typewriter Co. *v.* Chamberlain the plaintiff, a Delaware corporation, sued to recover the amount of a tax assessed upon it by the State of Connecticut. The tax was assessed upon the net income earned during the preceding year from business carried on within the state under a law providing for the apportionment of the total net income by a fixed rule. The plaintiff was engaged in the business of manufacturing typewriters and selling its products. Its main office was in New York City and all its manufacturing was done in Connecticut. With respect to the contention that the tax burdened interstate commerce and was therefore void under U. S. Const., Art. I, § 8, the court said as follows:

"Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. St. Louis Southwestern Ry. Co. *v.* Arkansas, 235 U. S. 350, 364; Atlantic & Pacific Telegraph Co. *v.* Philadelphia, 190 U. S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled. U. S. Glue Co. *v.* Oak Creek, 247 U. S. 321; Shaffer *v.* Carter, 252 U. S. 37, 57. Compare Peck & Co. *v.* Lowe, 247 U. S. 165. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

In Atlantic Coast Line *v.* Daughton the plaintiffs were interstate carriers each owning and operating a line of railroad within the State of North Carolina. Taxes were levied by the State under its law upon net income earned within the State. It was conceded by the plaintiffs that taxation of the net income of an interstate carrier does not violate the commerce clause, their contentions being that in fact gross income was taxed and unreasonable classifications were made by the statute. The court said in the opinion:

"That a State may, consistently with the Federal Constitution, impose a tax upon the net income of property, as dis-

tinguished from the net income of him who owns or operates it, although the property is used in interstate commerce, was settled in Shaffer *v.* Carter, 252 U. S. 37, 44, 52."

See also Schwab *v.* Richardson, U. S. Sup. Ct., decided November 12, 1923.

In the light of these decisions there can now be no doubt that foreign corporations may be taxed by a State if the tax is measured by the net income earned by the corporation within the State, and is laid without discrimination or direct interference with interstate commerce, although such income is *partly* derived from interstate commerce. The question is whether the rule is different where *all* the income earned within the State is derived from that source.

This question seems to be already settled by authority. While in the Underwood Typewriter case the court, in stating the result of the decisions, went no further than to say " that a tax measured by net profits is valid, although these profits may have been derived *in part,* or indeed *mainly,* from interstate commerce, is settled," yet in Shaffer *v.* Carter the case seems to have been one where, on the court's assumption that the plaintiff's method of business constituted interstate commerce, his income was all derived from that business and was therefore wholly derived from interstate commerce. It was said by Mr. Justice Brandeis dissenting, in Texas Transport & Terminal Co. *v.* New Orleans, U. S. Sup. Ct., February 18, 1924:

"It is settled law that interstate commerce is not directly burdened by a tax imposed upon property used exclusively in

interstate commerce . . .; or by a tax upon net income derived exclusively from interstate commerce, United States Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer v. Carter, 252 U. S. 37, 57; compare Peck & Co. v. Lowe, 247 U. S. 165."

See also 32 Harvard Law Review, 634–640, 646–649.
12 California Law Review, 39–44.
Cf. Knowlton *v.* Moore, 178 U. S. 41, 59.

The ground of decision in the cases referred to affords no basis for a distinction with respect to the validity of a tax measured by net income as between foreign corporations deriving their income *mainly* from interstate commerce and those deriving their income *solely* from that source. In that respect the cases differ fundamentally from other cases where the validity of certain taxes measured by the capital stock or gross receipts of foreign corporations was in question and those taxes were held to be valid only if they might reasonably be regarded as taxes on, or license fees for, the privilege of doing a local business as distinguished from interstate commerce. In the cases dealing with taxes on or measured by net income the court do not apply that test. They do not say the tax is valid as a tax on the privilege of doing a local business. They hold rather that net income from business within the State, even if that business is interstate commerce, is so indirectly related to interstate commerce that a tax on or measured by such income does not directly burden interstate commerce, so long as there is no discrimination in its imposition or enforcement. The burden is indirect just as in the case of a tax on property

where there is no discrimination, though in a given instance the property tax may be employed solely in interstate commerce. This is exemplified in the cases already cited.

United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 329:

"Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property."

The fact that the tax is not laid directly on net income, but, with respect to this feature of the tax, is an excise measured by net income, makes no difference. As we have shown, if a tax on property is valid a tax measured by the value of such property will also be valid. This is equally true, as the court has held, with respect to net income.

Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 120:

"We may lay on one side the question whether this is an excise tax purporting to be measured by the income accruing from business within the State or a direct tax upon that income; for the 'argument, upon analysis, resolves itself into a mere question of definitions, and has no legitimate bearing upon any question raised under the Federal Constitution'. Shaffer *v.* Carter, 252 U. S. 37, 55."

See also 12 California Law Review, 43.

The discussion under this heading is equally applicable to the tax assessed under St. 1921, c. 493, since that is a tax measured by net income apportioned to the Commonwealth.

With respect to the taxes in suit, so far as concerns that part which is measured by net income from Massachusetts business, it appears that they are reasonable and fair, are not discriminatory, and do not unduly burden interstate commerce. It is submitted that for the reasons stated that part of the tax which is measured by net income from business within the Commonwealth, as applied to a foreign corporation engaged exclusively in interstate commerce, is constitutional and valid.

Taking the taxes as a whole, it will be found that they are measured wholly by property and income used or earned in Massachusetts. Payment is not required as a prerequisite to doing business, and enforcement is left to the ordinary means of collecting taxes. Corporations, even although engaged exclusively in interstate commerce, should not be permitted entirely to escape taxation by the States in which they do business but should be required to make fair contribution to the support of the government the benefits of whose protection they enjoy. "Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the government under whose protection they conduct their operations," Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194, 220. To hold these taxes invalid with respect to foreign corporations engaged exclusively in interstate commerce and valid with respect to foreign corporations having a modicum of local business would confer a special benefit on the former class at the expense of the latter, which might work a considerable hardship against corporations which are competitors of those

so favored. As the state court said in the opinion in No. 327 of 1924:

"The tax considered as a whole with both its main factors is general in nature and reasonable in amount. The tax upon the petitioner in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth, and upon the exercise of its franchise within this Commonwealth, and, so far as concerns the factor of its income, upon the net income derived from business in this Commonwealth after all losses and expenses have been paid. It is not directed against interstate commerce or property outside the State but is confined to business done, property located, capital employed and net income earned within the Commonwealth. It affects interstate commerce indirectly and is not an immediate burden upon it. It affords to the State only a fair and reasonable revenue for the maintenance of the government, the benefits from the protection of which the petitioner enjoys."

III.

THE TAXES ASSESSED WERE MEASURED BY THE VALUE OF PROPERTY USED AND NET INCOME EARNED WITHIN THE COMMONWEALTH.

The argument under the preceding heading proceeded on the assumption that the taxes in controversy were computed and assessed, in accordance with the provisions of G. L., c. 63, § 39, and St. 1921, c. 493, in amounts equal to the required percentages of the value of property employed within the Commonwealth and of net income derived from business

carried on within the Commonwealth. It remains to show that this assumption was justified.

In assessing the 1921 and 1922 taxes under G. L., c. 63, the Commissioner was required to compute two amounts, —

"(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

"(2) An amount equal to two and one half per cent of that part of its net income . . . which is derived from business carried on within the commonwealth."

A statutory rule for determining "corporate excess employed within the Commonwealth" by a foreign corporation is given by G. L., c. 63, § 30, cl. 4, which is in substance that the proportion of the value of the assets, real and personal, employed in business within the Commonwealth on a particular date to the value of the total assets is to be multiplied by the fair cash value of all the shares of capital stock on that date, and from the product the value of real estate and machinery locally taxed and certain securities is to be deducted. As we have already shown, the result of the application of this rule, before making the deductions, should be an amount precisely equal to, and not an estimate or approximation of, the value of the real and personal assets of a foreign corporation, as part of a going concern, employed in business within the Commonwealth. It is settled that a tax may be laid on or measured by such value.

Pullman Co. *v.* Richardson, 261 U. S. 330, 338, 339.

In determining the value of the "corporate excess employed within the Commonwealth" it was necessary for the Commissioner to find the value of the assets employed in business within the Commonwealth. The value of the tangible assets so employed was given but the value of the intangible assets so employed was not given. The Commissioner accordingly proceeded to value those assets in accordance with a method prescribed by his general ruling, by taking a proportion of the total value of the intangible assets equal to the proportion of the remainder of net income allocable to Massachusetts by the statutory rule prescribed by G. L., c. 63, §§ 41 and 38, to the total of such remainder. Such determination it is submitted is justifiable for two reasons.

1. Assuming that the result of the allocating method prescribed by the statute fairly represented net income allocable to the Commonwealth, it is submitted that the same proportion of the intangible assets might fairly be allocated to the Commonwealth as employed within the Commonwealth, on the assumption that the intangible assets wherever situated contributed equally to the production of net income. Methods of apportionment apparently open to more serious criticism have been upheld and approved by this court.

Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530, 552, 553.

Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 18, 26.

Pittsburg, etc., Ry. Co. *v.* Backus, 154 U. S. 421, 430–432.

Adams Express Co. *v.* Ohio State Auditor, 165 U. S. 194.
St. Louis Southwestern Ry Co. *v.* Arkansas, 235 U. S. 350, 365.
Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 120, 121.

The method followed in Wallace *v.* Hines, 253 U. S. 66, was disapproved because in its particular application it was found to be unfair.

2. Under the Commissioner's general ruling the petitioner was given an opportunity, if the allocating method did not fairly reflect the proportion of the intangible assets employed in business in Massachusetts, to request determination by another method. The petitioner failed to avail itself of this privilege. It made no such request at any time. Therefore, it is submitted, it cannot now be heard to complain that the method employed was not fair and equitable.

In determining the net income derived from business within the Commonwealth the Commissioner proceeded in accordance with the statutory rule contained in G. L., c. 63, §§ 41 and 38. This rule requires the allocation first of gains from the sale of capital assets and certain kinds of interest, and, in the case of a foreign corporation carrying on any business outside the Commonwealth, the allocation of the remainder of net income by dividing it into three equal parts, one of which is to be multiplied by each of the following three ratios:

(*a*) The value of the tangible property in Massachusetts to the total value,

(*b*) Expenditure for wages and salaries assignable to Massachusetts to the total expenditure,

(*c*) Gross receipts from business assignable to Massachusetts to the total gross receipts,

and the deduction from the net income so allocated of an allowance for the value of machinery used in Massachusetts.

The amounts determined by the Commissioner for 1921 and 1922 respectively were calculated from figures furnished by the petitioner and shown by its return. Furthermore calculations were made in the returns themselves showing the amounts of net income derived from business in Massachusetts, which in the case of the 1922 tax were accepted by the Commissioner and in the case of the 1921 tax were accepted with some corrections. As to these corrections the respondent relies on the stipulation appearing in the record, as follows: "The amount of the tax assessed is not questioned, but may be referred to as bearing on the questions of law presented. No question of valuation is involved."

The method used by the Commissioner in allocating net income it is submitted is justifiable for two reasons corresponding to the two reasons applicable to the determination of the other part of the taxes.

1. The aim of the statute is to reach only net income earned within the State. Clearly net profits earned in Massachusetts could not be assigned specifically. The Legislature therefore sought to accomplish its object by taking into account different elements which enter into business done in Massa-

chusetts as compared with the whole of those elements. The three elements, inversely, are gross receipts, expenditure for wages and salaries, and value of tangible property. Obviously in this way a proportion is obtained which will more fairly represent net income attributable to Massachusetts than a proportion taken from any single element would produce. Doubtless the three elements named were selected because they could be more readily apportioned. The tax is not laid upon or measured by those elements directly. They are only used in combination to produce a fair approximation to net income attributable to Massachusetts as applied to foreign corporations generally. They produced such a result in the instant case. As the state court said:

"It seems to us that the question in this connection is not whether a subsidiary percentage standing alone may impinge upon property outside the Commonwealth, but whether the use of all the percentages makes the final result a tax which violates constitutional guarantees. The several percentages are not taxes levied upon the terms employed. They are used in combination to ascertain a sum which in amount as applied to all corporations may be reasonable. . . . The aim of the statute in this particular is to reach only profits earned within the State. The total net income for the year was $1,148,041.70, of which $15,370.06 was allocated to Massachusetts. The gross receipts assignable to Massachusetts, according to the petitioner's return, were $424,982.70, out of a total of $12,774,825.05. The facts do not appear to us to show that the proportion of net income ultimately allocated to this Commonwealth was in excess of the just amount."

Methods of apportionment certainly no less objectionable have been approved by this court.

Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 120, 121.
Atlantic Coast Line *v.* Daughton, 262 U. S. 413.

Measuring the value of property by gross receipts within the State alone has been held to be proper.

Maine *v.* Grand Trunk Ry. Co., 142 U. S. 217.
United States Express Co. *v.* Minnesota, 223 U. S. 335.
Cudahy Packing Co. *v.* Minnesota, 246 U. S. 450.
Pullman Co. *v.* Richardson, 261 U. S. 330.

2. A second sufficient reason for upholding the Commissioner's determination of the amount of net income attributable to Massachusetts business is that the statute (G. L., c. 63, § 42) gives to a foreign corporation the right to refuse to accept determination of the amount of such net income by the allocating method, and to have the amount determined from information furnished by the corporation, and that the petitioner made no such request. For that reason, it is submitted, this court is bound to assume that the amount as determined by the Commissioner fairly represents the amount of net income derived from Massachusetts business.

It does not appear by what method the Commissioner fixed the amount of net income apportioned to the Commonwealth under St. 1921, c. 493, imposing an excise tax of a percentage of such net

income. The amount of that net income as fixed by the Commissioner ($52.63) and the amount of that tax ($0.39) make further discussion of the point unnecessary.

It is submitted that the taxes which the petitioner seeks to recover were in all respects valid.

Respectfully submitted,

JAY R. BENTON,
Attorney General.

ALEXANDER LINCOLN,
Assistant Attorney General.

APPENDIX.

MASSACHUSETTS STATUTES.

Acts of 1903, Chapter 437.

"Section 75. Every foreign corporation of the classes described in section fifty-eight shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one hundredth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but it may deduct from such tax the amount of taxes upon property paid by it to any city or town in the commonwealth during the preceding year, and the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

Acts of 1909, Chapter 490, Part III.

"Section 54. Every foreign corporation shall annually, within thirty days after the date fixed for its annual meeting, or within thirty days after the final adjournment of said meeting, but not more than three months after the date so fixed for said meeting, prepare and file in the office of the secretary of the commonwealth, upon payment of the fee provided in section ninety-one of chapter four hundred and thirty-seven of the acts of the year nineteen hundred and three, a certificate signed and sworn to by its president, treasurer, and by a majority of its board of directors, showing the amount of its authorized capital stock, and its assets and liabilities as of a date not more than ninety days prior to said annual meeting, in such form as is required of domestic business corporations under the provisions of section forty-five of said chapter, and the change or changes, if any, in the other particulars included in the certificate required by section sixty of said chap-

ter, made since the filing of said certificate or of the last annual report.

. . . . . .

Section 56. Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax to be assessed by the tax commissioner of one fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of two thousand dollars."

Acts of 1914, Chapter 724.

"Section 1. Every foreign corporation subject to the tax imposed by section fifty-six of Part III of chapter four hundred and ninety of the acts of the year nineteen hundred and nine shall in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general for the use of the commonwealth, in addition to the tax imposed by said section fifty-six, an excise tax to be assessed by the tax commissioner of one one hundredth of one per cent of the par value of its authorized capital stock in excess of ten million dollars as stated in its annual certificate of condition.

Section 2. All laws now or hereafter in force relating to the assessment and collection of the tax imposed by said section fifty-six and all laws providing for appeal from any assessment made under said section fifty-six or for the recovery of any tax assessed thereunder shall, except so far as they are inconsistent with the provisions of this act, apply to the tax imposed by this act."

General Laws, Chapter 59.

"Section 5. The following property and polls shall be exempt from taxation:

. . . . . .

Sixteenth, Property, other than real estate, and other than machinery used in manufacture or in supplying or distributing water, owned by Massachusetts savings banks or co-operative banks, by Massachusetts corporations subject to taxation under chapter sixty-three or by foreign corporations subject to taxation under section thirty-nine or fifty-eight of said chapter."

GENERAL LAWS, CHAPTER 63.

"SECTION 30. When used in this section and sections thirty-one to fifty-two, inclusive, the following terms shall have the following meanings:

1. 'Domestic business corporation', every corporation organized under or subject to chapter one hundred and fifty-six.

2. 'Foreign corporation', every corporation, association or organization established, organized or chartered under laws other than those of the commonwealth, for purposes for which domestic corporations may be organized under chapter one hundred and fifty-six, which has a usual place of business in this commonwealth, or is engaged here, permanently or temporarily, in the construction, erection, alteration or repair of a building, bridge, railroad, railway or structure of any kind.

3. 'Corporate excess', in the case of a domestic business corporation, the fair cash value of all the shares constituting the capital stock of a corporation on the first day of April when the return called for by section thirty-five is due, less the value of the following:

(*a*) The works, structures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the commonwealth subject to local taxation, except such part of said real estate as represents the interest of a mortgagee.

(*b*) Securities, the income of which, if any, if received by a natural person resident in this commonwealth, would not be liable to taxation, except shares in national banks and voluntary associations, trusts and partnerships.

. . . . . .

SECTION 32. Except as otherwise provided in sections thirty-three and thirty-four, every domestic business corpora-

For balance of Section 30 see Rec. No. 103, pp. 31, 32.

tion shall pay annually, with respect to the carrying on or doing of business by it, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of the fair cash value of all the shares constituting its capital stock on the first day of April when the return called for by section thirty-five is due:

(1) An amount equal to five dollars per thousand upon the value of its corporate excess.

(2) An amount equal to two and one half per cent of that part of its net income, as defined in this chapter, which is derived from business carried on within the commonwealth.

. . . . . .

SECTION 38. Income of the classes described in the preceding section having been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

1. If the corporation carries on no business outside the commonwealth, the whole of said remainder shall be allocated to this commonwealth.

2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

(*a*) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

(*b*) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages,

salaries, commissions or other compensation to all its employees.

(c) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, the part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (b) rentals or

royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation.

7. If a corporation maintains an office, warehouse or other place of business in a state other than this commonwealth for the purpose of reducing its tax under this chapter, the commissioner shall, in determining the amount of its gross receipts from business assignable to this commonwealth, include therein the gross receipts from sales attributed by the corporation to the business conducted at such place of business in another state.

8. In the case of consolidated returns of net income, the commissioner shall allocate such income, so far as practicable, in accordance with the above rules.

9. A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditure of a corporation for wages, salaries, commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth.

10. From the net income allocated to this commonwealth there shall be deducted the same proportion thereof which the fair cash value of machinery owned by the corporation and used in manufacturing in the commonwealth bears to its total assets employed therein, and the amount remaining shall be its net income subject to tax under this chapter.

SECTION 39. Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of

one per cent of such proportion of the fair cash value of all the shares constituting its capital stock as the assets, both real and personal, employed in any business within the commonwealth on April first following the close of the taxable year, bear to the total assets of the corporation employed in business on said date:

(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth.

If two or more foreign corporations doing business in this commonwealth participated in the filing of a consolidated return of income to the federal government, the tax under paragraph (2) above may, at their option, be assessed upon their combined net income, in which case the tax shall be assessed to all said corporations and collected from any one or more of them. Foreign corporations thus affiliated and doing business in this commonwealth, which do not elect, under the foregoing provision, to be assessed upon their combined net income, and all other foreign corporations doing business in this commonwealth, which have filed with one or more corporations not subject to this section a consolidated return of net income to the federal government, shall each file with the commissioner, as a part of the return required by this chapter, a statement of net income in such form as he may prescribe, showing the gross income and deductions in accordance with the law and regulations governing the usual federal returns of corporations not thus affiliated; and the net income thus shown, after making deductions therefrom and additions thereto as provided in paragraph five of section thirty, shall be the 'net income' under this chapter.

SECTION 40. Every foreign corporation shall make returns as provided in sections thirty-five and thirty-six; and all pro-

visions of said sections shall apply to such corporations, except that the term 'corporate excess' in said section thirty-five shall, in the case of a foreign corporation, mean the corporate excess employed by it within the commonwealth.

SECTION 41. The commissioner shall determine in the manner provided in this section the part of the net income of a foreign corporation derived from business carried on within the commonwealth.

The following classes of income shall be allocated as follows:

(*a*) Gains realized from the sale of capital assets, if such assets consist of real estate or tangible personal property situated in the commonwealth, shall be allocated to this commonwealth.

(*b*) Interest received from any corporation organized under the laws of the commonwealth or from any association, partnership or trust having transferable shares and having its principal place of business in the commonwealth, or from any inhabitant of the commonwealth, except interest received on deposits in trust companies or in national banks doing business in the commonwealth, shall be allocated to this commonwealth.

(*c*) Gains realized from the sale of capital assets other than those named in paragraph (*a*) above shall not be allocated in any part to this commonwealth.

Income of the foregoing classes having thus been allocated, the remainder of the net income as defined in section thirty shall be allocated as follows:

If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth.

If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight.

SECTION 42. A foreign corporation carrying on part of its business outside the commonwealth may, in lieu of the allocating method required by the preceding section for determining the amount of business assignable to this commonwealth, refuse

to accept such determination by notification thereof to the commissioner on or before the time when its income tax return under this chapter is due to be filed. Such a foreign corporation shall, within thirty days thereafter, file with the commissioner, under oath of its treasurer, a statement in such detail as the commissioner shall require, showing the amount of its annual net income derived from business carried on within the commonwealth. The commissioner may require such further information with reference thereto as he may deem necessary for the assessment of the tax, and shall determine the proportion of the net income received from business carried on within the commonwealth.

SECTION 43. After determining the amount of tax due from any foreign corporation under paragraph (2) of section thirty-nine, the commissioner shall then credit the corporation with a sum equal to five per cent of the dividends paid by it, during the previous calendar year, to inhabitants of this commonwealth, and the amount then remaining due shall be the amount of tax to be levied upon the corporation under said paragraph; provided, that if more than one half of the capital stock of any such corporation is owned by another foreign corporation not subject to taxation under sections thirty to fifty-one, inclusive, but has stockholders who are inhabitants of this commonwealth and are subject to taxation upon their income under section one of chapter sixty-two, such corporation, upon filing with the commissioner such information as he shall deem necessary for the purpose, shall be credited with a sum equal to five per cent of such a proportion of its total dividends as will prevent double taxation of the income of the corporation and of the dividends of such other foreign corporation actually taxed to inhabitants of this commonwealth.

. . . . . .

SECTION 47. The commissioner shall make from time to time such reasonable rules and regulations, consistent with

sections thirty to fifty-one, inclusive, as he may deem necessary for carrying out their provisions.

. . . . . .

SECTION 52. If the excise imposed by section thirty-two on domestic business corporations, or that imposed by section thirty-nine on foreign corporations, is declared unconstitutional by a final judgment, order or decree of the United States supreme court or the supreme judicial court of the commonwealth, sections thirty to fifty-one, inclusive, shall be null and void, and all laws repealed or made inoperative by chapter three hundred and fifty-five of the General Acts of nineteen hundred and nineteen shall thereupon be revived and continue in full force and effect as if the said chapter had not been enacted. In such case the commissioner and local assessors shall forthwith assess all taxes that have become due under such prior laws, and the time for making any assessment or performing any other duty imposed or privilege granted by such laws shall be extended for a period of six months after the date when they are thus determined to be in force, and the time within which corporations may apply by petition to the supreme judicial court under section seventy-seven for the abatement of the excise imposed by section thirty-two, or of that imposed by section thirty-nine, shall be extended for the same period. If any part, section or subdivision of said sections thirty to fifty-one, inclusive, other than the provisions in sections thirty-two and thirty-nine imposing an excise, shall be declared unconstitutional, the validity of the remaining parts of said sections thirty to fifty-one, inclusive, shall not be affected thereby."

GENERAL LAWS, CHAPTER 156.

"SECTION 2. Except as expressedly made applicable by reference in subsequent chapters, this chapter shall not apply to corporations organized for the purpose of carrying on the business of a bank, savings bank, co-operative bank, trust com-

pany, credit union, surety or indemnity company, or safe deposit company, or for the purpose of carrying on within the commonwealth the business of an insurance company, railroad, electric railroad, street railway or trolleymotor company, telegraph or telephone company, gas or electric light, heat or power company, canal, aqueduct or water company, cemetery or crematory company, or to any other corporations which now have or may hereafter have the right to take land within the commonwealth by eminent domain or to exercise franchises in public ways granted by the commonwealth or by any county, city or town. It shall apply to all other domestic corporations having a capital stock and heretofore or hereafter established either by general or special law for the purpose of carrying on business for profit except as provided in chapter one hundred and fifty-seven and except so far as such application may be inconsistent with provisions still in force of any special acts of incorporation, enacted before March eleventh, eighteen hundred and thirty-one, and not subject to amendment, alteration or repeal by the general court, or with provisions of any special acts of incorporation hereafter enacted; and this chapter shall govern the amount of real or personal estate which any corporation subject to it may hold, and the right to increase or decrease its capital stock, notwithstanding the provisions of any special act of incorporation, except in the case of corporations empowered to manufacture, store, transmit, sell or distribute power.

It shall also apply to agricultural or horticultural organizations, instituted for purposes of mutual help, which corporations, if formed for the purpose of doing business at cost for the benefit of their members, shall not be required to have capital stock."

ACTS OF 1921, CHAPTER 361.

"SECTION 1. The tax assessed in the year nineteen hundred and twenty-one in accordance with the provisions of section thirty-two of chapter sixty-three of the General Laws and the

tax assessed against any foreign corporation in accordance with the provisions of section thirty-nine of said chapter sixty-three shall be not less than an amount equal to one twentieth of one per cent of the said corporation's gross receipts from business assignable to this commonwealth as defined in clause six of section thirty-eight of said chapter sixty-three.

SECTION 2. All provisions of chapters fifty-eight and sixty-three of the General Laws relative to assessment, collection, payment, abatement, penalties, distribution and administration shall, so far as pertinent, be applicable to taxes under this act."

ACTS OF 1921, CHAPTER 493.

"SECTION 1. Every corporation subject to the provisions of sections thirty to sixty, inclusive, of chapter sixty-three of the General Laws, shall pay, in addition to all other taxes, an excise tax at the rate of three quarters of one per cent of its net income as herein defined and apportioned to this commonwealth. 'Net income' shall mean the net income of said corporations for the period covered by their return of income to the federal government due next prior to April first, nineteen hundred and twenty-one, subject to the provisions of the following sections.

. . . . . .

SECTION 5. The proportion of the net income taxable under this act in cases of corporations carrying on business outside of this commonwealth shall be as follows: — In the case of a corporation deriving profits principally from the ownership, sale or rental of real estate, and in case of a corporation deriving profits principally from the sale or use of tangible personal property owned by it, such proportion as the fair cash value of its real estate and tangible personal property in this commonwealth on April first of the current year is to the fair cash value of the entire real estate and tangible personal property owned by it on that date with no deduction on account of any encumbrance thereon.

In the case of a corporation deriving profits principally from the holding or sale of intangible property such proportion as its gross receipts assignable to this commonwealth for the year covered by its return is to its gross receipts for such year within and without the commonwealth.

In case neither of the above methods is applicable, the commissioner of corporations and taxation shall determine, in such manner as he deems equitable, the proportion of the net income received from business carried on within this commonwealth.

The apportionment of net income to this commonwealth as provided in this section shall apply to all corporations, domestic or foreign, which are taxable under this act."

Supreme Court of the United States

OCTOBER TERM, 1924

No. 103 and No. 327

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff in Error,

v.

COMMONWEALTH OF MASSACHUSETTS,
Defendant in Error.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

and

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

JAY R. BENTON,
Attorney General.

ALEXANDER LINCOLN,
Assistant Attorney General.

Supreme Court of the United States.

October Term, 1924.

No. 103 and No. 327.

ALPHA PORTLAND CEMENT COMPANY,
PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT IN ERROR.

MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF.

Now comes the Commonwealth of Massachusetts by Alexander Lincoln, Assistant Attorney General, and moves the court for leave to file in the above-entitled cause the supplemental brief herewith exhibited, for the specific purpose of stating, in response to the inquiry made at the argument, the grounds on which, as the defendant in error contends, the case of Texas Transport and Terminal Co., Inc., *v.* New Orleans, 264 U. S. 150, may be distinguished from the cases at bar.

COMMONWEALTH OF MASSACHUSETTS,
By ALEXANDER LINCOLN,
Assistant Attorney General.

Supreme Court of the United States.

October Term, 1924.

No. 103 and No. 327.

ALPHA PORTLAND CEMENT COMPANY,
PLAINTIFF IN ERROR,

v.

COMMONWEALTH OF MASSACHUSETTS,
DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Inquiry was made at the argument of these cases, respecting the case of Texas Transport and Terminal Co., Inc., *v.* New Orleans, 264 U. S. 150, on what grounds that case may be distinguished from the cases at bar.

Examination of the record in that case (Rec. pp. 10, 11, 32) discloses that the tax of which the plaintiff in error there complained was a license tax imposed by a municipal ordinance, No. 6608 of the Commission Council of New Orleans, which levied a graded license tax upon every business, trade or occupation subject to taxation, including the business of steamship

agents. The tax on that business was graded by the ordinance according to the annual gross receipts of the business, with a maximum of $400 when the year's receipts amounted to $100,000 or more. The ordinance provided that "if the taxpayer does not procure such license, it shall be enjoined from engaging in business in New Orleans"; and it was stipulated that "under the provisions of Ordinance No. 6608, the defendant in rule (plaintiff in error) is required, as a condition to its acting as steamship agent in the City of New Orleans, to procure from the City of New Orleans a license to do so," and again that "the effect of the Ordinance, therefore, is that, if the city of New Orleans can exact such license from the defendant in rule, and if defendant in rule does not pay such license, defendant in rule should be enjoined from acting as steamship agent in the city of New Orleans."

That case is distinguished from the cases at bar, it is submitted, both because the tax is a license tax, payment of which is a condition precedent to the right to do business which may be enforced by injunction, and because the measure of the tax is gross receipts and not net income.

Either of these two grounds, it is submitted, furnishes a sufficient basis for the distinction.

The first basis of distinction is clearly explained in Underwood Typewriter Co. *v.* Chamberlain, 254 U. S. 113, 119, where the court said:

> "Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. St. Louis Southwestern Ry. Co. *v.* Arkansas, 235 U. S. 350, 364; Atlantic & Pacific Telegraph

Co. *v.* Philadelphia, 190 U. S. 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 695."

In Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 696, the court said:

"But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State, (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon,) and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes. The corporation is thus made to bear its proper proportion of the burdens of the government under whose protection it conducts its operations, while interstate commerce is not in itself subjected to restraint or impediment."

The second basis of distinction is clearly explained in United States Glue Co. *v.* Oak Creek, 247 U. S. 321, 328, 329, in which the court said:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our

decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal constitution because they happen to be engaged in commerce among the States."

Again in Shaffer *v.* Carter, 252 U. S. 37, 57, the court said:

"It is urged that, regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of the State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say that the tax is imposed not upon the gross receipts, as in Crew Levick Co. *v.* Pennsylvania, 245 U. S. 292, but only upon the net proceeds, and is plainly sustainable even if it

includes net gains from interstate commerce. U. S. Glue Co *v.* Oak Creek, 247 U. S. 321. Compare Peck & Co. *v.* Lowe 247 U. S. 165."

Respectfully submitted,

JAY R. BENTON,
Attorney General.

ALEXANDER LINCOLN,
Assistant Attorney General.

FILED
OCT 21
WM. R. STA

IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

Nos. 103, 327.

ALPHA PORTLAND CEMENT COMPANY,
Plaintiff-in-Error,
v.
COMMONWEALTH OF MASSACHUSETTS,
Defendant-in-Error.

IN ERROR TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

BRIEF FOR AMERICAN SALES BOOK COMPANY, LTD., AND SHREDDED WHEAT COMPANY, AS FRIENDS OF THE COURT, FILED BY LEAVE.

BASIL ROBILLARD,
Counsel for Amici Curiae.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

In The

Supreme Court of the United States

October Term, 1924.

Alpha Portland Cement Company, *Plaintiff-in-Error,* v. Commonwealth of Massachusetts, *Defendant-in-Error.*	Nos. 103, 327.

PLEASE TAKE NOTICE, that upon the annexed petition and brief the undersigned as counsel for American Sales Book Company, Ltd., and The Shredded Wheat Company will apply to the Supreme Court of the United States at Washington, D. C., at the next motion day thereof, October 21st, 1924, at the opening of Court on that day, or as soon thereafter as counsel can be heard, for leave to intervene herein as friends of the Court and to file the accompanying brief.

BASIL ROBILLARD,
Counsel for American Sales Book Company, Ltd., and The Shredded Wheat Company, as friends of the Court in this cause,
Office and P. O. Address,
425-443 Gluck Building,
Niagara Falls, N. Y.

To

Mr. Louis H. Porter,
Counsel for Plaintiff-in-Error,
The Attorney General of Massachusetts,
Counsel for Defendant-in-Error.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1924.

ALPHA PORTLAND CEMENT COMPANY, *Plaintiff-in-Error,* v. COMMONWEALTH OF MASSACHUSETTS, *Defendant-in-Error.*	Nos. 103, 327.

The petition of American Sales Book Company, Ltd., a corporation of Ontario, doing business in the State of New York, and of Shredded Wheat Company, a corporation of New York, doing business in that State, respectfully shows to the Court:

1. That your petitioners are engaged in interstate commerce into and in the Commonwealth of Massachusetts, and neither of your petitioners

do any business wholly within the Commonwealth of Massachusetts.

2. That excise taxes similar to those assessed upon the plaintiff-in-error in this cause have been assessed against your petitioners for the years 1920, 1921, 1922, 1923 and 1924; that your petitioners have duly protested against said taxes and appealed therefrom. Protests and said appeals were denied by the Tax Authorities of Massachusetts. Petitioners are now preparing proceedings before the Supreme Judicial Court of Massachusetts, pursuant to the Statute under which said taxes were assessed, for review of the same, all preliminary to presenting to this Court questions arising under the third clause of the eighth section of Article I of the Constitution of the United States, and questions arising under the Fourteenth Amendment to the Constitution of the United States in reference thereto also raised before said Tax Authorities of Massachusetts.

3. That your petitioners are situated similarly to the plaintiff-in-error above named with the exception that against your petitioner, American Sales Book Company, Ltd., a proceeding for injunction under Section 75 of the statute under which said taxes were assessed was commenced by the Attorney General of Massachusetts on the relation of the Commissioner of Corporations and Taxation to restrain said petitioner from further doing business within the Commonwealth of Massachusetts until said taxes were paid, and

with the exception that the Commonwealth of Massachusetts, through its taxing authorities, has each year assessed upon all the property of your petitioner, Shredded Wheat Company, in the Commonwealth of Massachusetts property taxes which have been duly paid.

4. That your petitioners, being in a such similar situation to the plaintiff-in-error, are desirous of laying before this Court a short brief duplicating as little as possible the brief of the attorneys for the plaintiff-in-error, setting forth the situation of your petitioners and the applications of the law to cases such as theirs.

WHEREFORE, your petitioners pray leave to intervene herein as friends of the Court and to file the annexed brief.

All of which is respectfully submitted,

AMERICAN SALES BOOK COMPANY, LTD.,

THE SHREDDED WHEAT COMPANY,
By Basil Robillard,
Their Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1924.

ALPHA PORTLAND CEMENT COMPANY, *Plaintiff-in-Error,* v. COMMONWEALTH OF MASSACHUSETTS, *Defendant-in-Error.*	Nos. 103, 327.

In error to the Supreme Judicial Court of Massachusetts.

BRIEF FOR AMERICAN SALES BOOK COMPANY, LTD., and SHREDDED WHEAT COMPANY, as Friends of the Court, Filed by Leave.

By leave, American Sales Book Company, Ltd., and Shredded Wheat Company file this brief as friends of the Court. Duplication of the brief for the plaintiff-in-error will be avoided so far as possible.

Status of These Parties.

American Sales Book Company, Ltd., is a corporation of the Province of Ontario, manufacturing merchandise at Elmira, New York, and Niag-

ara Falls, New York, and selling it in interstate commerce. Shredded Wheat Company is a corporation of New York, manufacturing food in Niagara Falls, N. Y., and selling it in interstate commerce. Both companies have rented offices in Boston, Massachusetts, which are headquarters for salesmen travelling in various parts of New England, taking orders which are sent to the respective home offices in New York State for acceptance or rejection. The merchandise to fill these orders is shipped direct to purchasers in interstate commerce. Neither company maintains a stock of goods in Massachusetts, or delivers or ships any property from point to point within Massachusetts, or out of Massachusetts. Collections of accounts are made by mail from the factories of each in New York State. The only property that either company has in Massachusetts consists of the equipment of the Boston office,—$872 in value in the case of American Salesbook Company, Ltd., and $4500 in the case of Shredded Wheat Company.

Shredded Wheat Company has received and paid annual assessments of property tax upon its personal property in Massachusetts, aside from the excises assessed against it under Chapter 63 of the General Laws, which are here in question.

These latter excises upon these parties follow:

American Salesbook Company, Ltd.

1920..	$277.01
1921...	312.32

	1922..	333.37
	1923..	483.72
	1924..	776.58
Shredded Wheat Company,	1921..	$1,477.40
	1922..	3,573.23
	1923..	3,213.91
	1924..	2,071.92

Proceedings for review thereof have been completed in the Tax Department as provided by the statute, except as to the 1924, proceedings for review of these being now in the Department. All of these excises except those for 1924 have been paid under protest, and are the subject of petitions for review under the statute in the Supreme Judicial Court of Massachusetts. The protests and appeals filed and refused in the Tax Department, and the petitions for review all raise specifically the issues here contended for by the plaintiff-in-error and those referred to in this brief.

Payment of these excises is made a condition precedent to the conduct of interstate commerce with inhabitants of Massachusetts and the excises are, therefore, void.

We invite attention to Section 75 of Chapter 63 of the General Laws of Massachusetts, providing for the collection of these excises.

> "Section 75. In addition to the methods provided by sections seventy-two and seventy-three, taxes under this chapter, except section sixty-two, may be collected by an

information brought in the Supreme Judicial Court by the Attorney General at the relation of the Commissioner. The Court may issue an injunction, restraining the further prosecution of the business of the company, association or corporation until such taxes, with interest and costs thereon, have been paid; but no telegraph company accepting the provisions of section fifty-two hundred and sixty-three of the Revised Statutes of the United States shall be enjoined from constructing, maintaining or operating a telegraph line over and along any of the military or post roads of the United States within this commonwealth."

Under this section, the Attorney General of Massachusetts, at the relation of Henry F. Long, Commissioner of Corporations and Taxation, brought an information in the Supreme Judicial Court under No. 38364, entitled:

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

JAY R. BENTON, Attorney General at the relation of HENRY F. LONG, Commissioner of Corporations and Taxation, v. AMERICAN SALES BOOK CO., LTD.	No. 38364. In the Supreme Judicial Court of the State of Massachusetts, sitting in and for the County of Suffolk, in said State.

This information, reciting the non-payment of the excise tax for 1922, under Chapter 63 of the General Laws, sought relief as follows:

> "WHEREFORE, your informant prays a decree that said sum is due the Commonwealth from said corporation, as its tax aforesaid, and that the same be paid, with interest as aforesaid, and costs, and that a writ of injunction issue, restraining the further prosecution of the business of said corporation until said sums are fully paid, and for such other relief in the premises as justice may require."

That cause was removed to the District Court of the United States for the District of Massachusetts, and placed upon its calendar under No. 1843. A copy of the information as certified by the Clerk of the Supreme Judicial Court of Massachusetts under its seal is annexed to this brief.

The payment of these excises is therefore an obvious condition precedent to the conduct of business in Massachusetts. American Salesbook Company, Ltd., has always conducted its business with the inhabitants of Massachusetts as above described, in pure interstate commerce. The Commonwealth under Section 75 has sought to stop the conduct of that business by an injunction "restraining the further prosecution of the business of said corporation until said sums are fully paid". The continuance of interstate commerce being conditioned upon the payment of this state excise, the excise is void as an unconstitutional attempt to regulate interstate commerce, contrary to Section 8 of Article I of the United States Constitution, and contrary to the Fourteenth Amendment thereto.

LeLoup vs. Port of Mobile, 127 U. S. 640.
Postal Telegraph Co. vs. Adams, 155 U. S. 688.

Approved in:
Atlantic & Pacific vs. Philadelphia, 190 U. S. 160.
Underwood Typewriter Co. vs. Chamberlain, 254 U. S. 113.

As its enforcement was sought, the section should not be disregarded.

St. Louis, &c., R. R. Co. vs. Arkansas, 235 U. S. 350.

The Court below evidently recognized that such a provision would invalidate the statute (Record, p. 29); and it does invalidate it.

Looney vs. Crane Co., 245 U. S. 135.
International Textbook Co. vs. Pigg, 217 U. S. 91.

The scheme of the excise on foreign corporations is beyond the jurisdiction of Massachusetts and the excise is void.

The excise is two-fold. It consists of a tax on "Income Assignable to Massachusetts" and a tax on "The Corporate Excess employed * * * * in Massachusetts" (Sec. 39 Record p. 37). Examination of the statutory definition of the subjects of taxation proves the tax on foreign corporations beyond the jurisdiction of the Commonwealth.

Section 41 of the Statute (p. 37), by reference to Section 38 (p. 35), defines the taxable income. It is the total income of the corporation apportioned in three parts. One-third is proportioned in the ratio of tangible assets in Massachusetts to those outside. This may be valid. Another third is proportioned in the ratio between wages paid to employees "not chiefly situated at, connected with or set out from premises * * outside the Commonwealth" (Section 37 Sub. 5 p. 36) and all wages paid. This is based upon the location of the office and not the location of the rendition of services and has no possible relationship to income from Massachusetts. The final third is proportioned in the ratio between gross receipts from all sales, except those negotiated by agents "situated at, connected with or sent out from premises * * outside the Commonwealth" (Section 37 Sub. 6 p. 36). Again, the location of the office and not the location of the sales or the purchaser is the determining factor and the result has no possible relationship to income from Massachusetts.

Applying this scheme to these companies for example, we find : They conduct interstate business throughout New England by salesmen connected with a Boston office. They are required to pay tax upon an "assigned income" computed on the salaries paid to New England salesmen (not Massachusetts salesmen only) and upon gross sales in New England (not Massachusetts only), upon the pretext that the test

is that these salesmen are not connected with any other than the Boston office. Under the statute, if the New England salesmen were connected with no office, situated at no office and sent out from no office, but working independently in a territory outside Massachusetts the tax would still be computed thus upon that business. The situation of the office and not the place of the agent's activity; the situation of the office and not the source of the income, these are the criteria. The office location has not any relation to the income from Massachusetts, which is fixed by the residence of the customers. The tax is upon income from New England, or which can only be apportioned under the scheme to the whole of New England, and is therefore upon subjects beyond the territory of Massachusetts, and outside its jurisdiction. The tax on income as assigned and fixed is, therefore void.

The state computation of corporate excess for tax purposes is similarly fallacious. The opinion below in Case No. 327 recites and approves as a proper interpretation of the statute Order No. 2505 of the Commissioner of Taxation. This order assigns to Massachusetts as taxable corporate excess the value of all tangibles therein (with immaterial exceptions) plus that proportion of the value of all intangibles wherever located which "that portion of the remainder of income allocable in Massachusetts under the provisions of Section 19 of the act bears to the total of said

remainder," The income allocation, as shown, is based upon activities and sales throughout New England. The corporate excess is also thus allocated arbitrarily upon the same agents' activities and sales. That bank deposits patents or even goodwill should be thus allocated is an apparent unjustified assumption of jurisdiction. Accounts receivable certainly cannot thus be legally brought into Massachusetts for taxation. They follow the residence of the debtor. The attempt to seize a large proportion of them for taxation is clearly unjustified.

Conceding the propriety of an arbitrary allocation such as this, the basis of it here cannot be sustained. It does not accord with fairness or reasonableness. Neither does it nor can it, correspond at all to the value of any assets actually or potentially within the Commonwealth.

The court below in its opinion at page 25 of the Record would justify the tax as an excise "for the privilege of having a place of business under the protection of our laws, and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done here." However the business done is also under the protection in part of every other state of New England, and receives its advantages. The income designated attributable to Massachusetts in fact can be attributed only to it in part, and the

remainder must be attributed to those other states which are the source thereof. Likewise in the present cases the corporate excess made up almost entirely of intangibles assigned to Massachusetts, if attributable at all, upon the present scheme must be attributable in large part to the other New England states and cannot all be taxed in Massachusetts. The attempt to do so is beyond the jurisdiction of that Commonwealth.

The arbitrary nature of the allocation vitiates the tax.

Union Tank Co. vs. Wright, 249 U. S. 275, 282.

Postal Telegraph Co. vs. Adams, 155 U. S. 688, 695.

The location of the Boston office is no proper basis for allocation of income or intangible property.

Cheney Bros. vs. Massachusetts, 246 U. S. 153, 154.

The tax being based upon property outside the state, and not allocable to the state, or not properly allocated there, is void.

Looney vs. Crane Co., 245 U. S. 178.

Meyers vs. Wells, Fargo & Co., 223 U. S. 290.

The property of Shredded Wheat Company, once taxed, cannot be the basis of this as a property tax.

Attention has been called to the property tax levied and paid upon the assets of Shredded Wheat Company in Massachusetts annually. The court below would sustain this excise partly upon the ground that plaintiff-in-error "has a small amount of personal property permanently within the commonwealth upon which it pays no tax except by way of this factor of the excise," evidently referring to the distinction in *St. Louis R. Co. vs. Arkansas,* 235 U. S., 350, at page 367. Even if its decision were to be sustained, we submit that such cases should be distinguished.

Inaccuracies of Fact Below.

Plaintiff-in-error was unsuccessful below largely because the Court misinterpreted several very pertinent facts which an examination of the entire record will clearly indicate:

> "The value of the corporate excess employed in the Commonwealth as a factor of the tax is not measured by the capital stock of the corporation." (Opinion, Record, p. 25).

Vide Record, p. 13, Table I, which indicates that the capital stock valuation where obtainable is a material factor.

In the case of these two corporations it was obtainable and used for valuation of corporate excess by the Department.

> "It is measured by the value of the property employed in the Commonwealth." (Record, p. 25).

We have shown that the measure has nothing to do with employment within the Commonwealth, but is rather based upon an arbitrary assignment to employment in New England.

> "The tax, as measured by the net income from business transacted in Massachusetts as a factor, etc." (Record, p. 27).

The business is transacted in New England in large part in these cases.

> "The tax upon the petitioner in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon credits due it from debtors within this Commonwealth and upon the exercise of its franchise within this Commonwealth, and so far as concerns the factor of its income, upon the net income derived from business within this Commonwealth, after all losses and expenses have been paid. It is not directed against interstate commerce or property outside the state, but is confined to business done, property located, capital employed and net income earned within the Commonwealth." (Record, p. 29).

We submit that to so hold is to ignore the facts that the business is done throughout New Eng-

land, the capital employed there, the income earned there; and that even accounts receivable outside the state are brought in for tax, the credits referred to springing in fact throughout the country, and if allocable, are only allocated to New England.

> "The aim of this statute in this particular is to reach only profits earned within the state." (Record, p. 30).

It is also implied (Record, p. 25) that the right to continue interstate business was not dependent upon the payment of the tax. The proceedings against American Salesbook Company, Ltd., under Section 75 (omitted from the Record but set forth above) demonstrate the inaccuracy of any such inference.

Suggestions of the Intervenors.

It is respectfully suggested to the Court that the excise is invalid under the Commerce Clause and the Fourteenth Amendment:

1. As a condition precedent to the transaction of interstate commerce under Section 75 of the act.

2. As a tax upon property beyond the jurisdiction of the Commonwealth, not allocable to its jurisdiction.

3. As based upon a grossly improper and invalid allocation, arbitrarily made upon the loca-

tion of an office, and not upon either business, income or property location.

It is further respectfully suggested that if upon this record this Court feels obliged to affirm, that cases in which threatened actual restraint of commerce, or the payment of another personal property tax shall appear be distinguished, or not decided by implication.

Respectfully submitted,

BASIL ROBILLARD,
Counsel for Intervenors.

APPENDIX.

THE COMMONWEALTH OF MASSACHUSETTS.

To the Supreme Judicial Court:

JAY R. BENTON, Attorney-General, at the relation of Henry F. Long, Commissioner of Corporations and Taxation, for and on behalf of the Commonwealth informs the court that the American Sales Book Co., Ltd. has been since a time prior to the first day of April, 1920, and is now a corporation organized by law for purposes of business or profit, subject to the provisions of General Laws, chapter 63, and acts in amendment thereof and in addition thereto, and is liable to a tax upon its net income and corporate excess in accordance with the provisions of said chapter 63; that on the 21st day of May, 1922, in accordance with the law, the commissioner of corporations and taxation of the Commonwealth duly ascertained and assessed the amount of the tax payable by said corporation to the Commonwealth, in and for said year, at the sum of four thousand one hundred eighty-seven 96/100 dollars; that the commissioner of corporations and taxation on the 21st day of May gave notice, in accordance with law, to the treasurer of said corporation of the amount of said tax and that it would be due and payable to said Commissioner of Corporations and Taxation by said corporation, within thirty days after the date of said notice, but not before the twen-

tieth day of June, 1922, and that within thirty days after the date of such notice said corporation might apply for a correction of said tax.

And your informant says that by virtue of law and said proceedings, said corporation became liable and was bound to pay said tax to said Commissioner of Corporations and taxation within thirty days after the date of said notice, but that said corporation has not paid said tax, or any portion thereof, and has unlawfully neglected and omitted to pay the same and still owes the same to the Commonwealth, with interest thereon at the rate of twelve per cent per annum from the date when said tax became due and payable.

WHEREFORE, your informant prays a decree that said sum is due the Commonwealth from said corporation, as its tax aforesaid, and that the same be paid, with interest as aforesaid, and costs, and that a writ of injunction issue, restraining the further prosecution of the business of said corporation until said sums are fully paid, and for such other relief in the premises as justice may require.

JAY R. BENTON,
Attorney-General.

A true Copy,

(Seal).

Nullivendemus
Nullinrgabimus
Justitiam

Attest,
(Signed) JOSEPH RILEY,
Asst. Clerk.

July 29, 1923.

SUPREME COURT OF THE UNITED STATES.

Nos. 103 and 327.—October Term, 1924.

Alpha Portland Cement Company, Plaintiff in Error, *vs.* Commonwealth of Massachusetts.	In Error to the Supreme Judicial Court of the State of Massachusetts.

[May 4, 1925.]

Mr. Justice McReynolds delivered the opinion of the Court.

Plaintiff in error claims that the Commonwealth illegally exacted of it $800.45 as an excise tax for the year 1921, and $567.57 plus $22.97 interest for 1922. The court below upheld the tax and definitely ruled that it was not repugnant to the Fourteenth Amendment or the Commerce Clause of the federal Constitution. 244 Mass. 530; 248 Mass. 156. With negligible exceptions the assessments followed the Corporation Tax Law (Gen. Acts 1919, c. 355), now codified in Gen. Laws, c. 63. Chapters 361 and 493, Gen. Acts 1921, are subsidiary and demand no particular notice. Record No. 327 discloses how the assessments were calculated; also the essential facts hereinafter stated. The opinion in No. 103 discusses the fundamental questions of law; the later one is supplementary and explanatory.

The statute provides that "every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the Commonwealth, an excise equal to the sum of . . . five dollars per thousand upon the value of the corporate excess employed by it within the Commonwealth" and "two and one-half per cent. of that part of its net income . . . which is derived from business carried on within the Commonwealth;" provided that the total tax shall be not less than an amount equal to one-twentieth of one per cent. of such proportion of the fair cash value of its capital stock as its assets employed within the State shall bear to the total assets. Annual returns, and additional information when demanded, must be filed with the Commissioner. He

is empowered to determine, under prescribed rules, the net portion of income from business within the State. But if dissatisfied any corporation may file "a statement in such detail as the Commissioner shall require, showing the amount of its annual net income derived from business carried on within the Commonwealth." Credit for five per cent. of dividends paid to inhabitants of the State is authorized. Pertinent portions of the general statute are in the margin.*

We accept the following statements in the opinion below: "The petitoner is a corporation organized under the laws of New Jersey. Its business is the manufacture and sale of cement. Its principal office is at Easton, Pennsylvania. Its mills are located in several other States outside of Massachusetts, from which shipments are made to various parts of the United States and to foreign countries. It maintains an office in Boston in charge of a district sales manager, with a clerk, where its correspondence and other natural

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*"Section 39. Every foreign corporation shall pay annually, with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of the following, provided that every such corporation shall pay annually a total excise not less in amount than one twentieth of one per cent of such proportion of the fair cash value of all the shares constituting its capital stock as the assets, both real and personal, employed in any business within the commonwealth on April first following the close of the taxable year, bear to the total assets of the corporation employed in business on said date:

"(1) An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the commonwealth.

"(2) An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within the commonwealth. . . ."

"Section 30. . . . 'Corporate excess employed within the commonwealth' by a foreign corporation, [shall mean] such proportion of the fair cash value of all the shares constituting the capital stock on the first day of April when the return called for by section thirty-five is due as the value of the assets, both real and personal, employed in any business within the commonwealth on that date, bears to the value of the total assets of the corporation on said date. . . .

"'Net income,' . . . [shall mean] the net income for the taxable year as required to be returned by the corporation to the federal government under the federal revenue act of nineteen hundred and eighteen," less interest on obligations of the United States.

"Section 41. The commissioner shall determine in the manner provided in this section the part of the net income of a foreign corporation derived

business activities in connection with the receipt of orders and shipments of goods for the New England States are conducted. The office is used as headquarters for travelling salesmen, who solicit orders in Massachusetts and the other New England States. Orders so taken are transmitted at the Boston office by mail to the principal office at Easton, Pennsylvania, where exclusively they are passed upon, and if accepted, the goods are shipped and invoices sent directly to the customer. Remittances usually are made to the petitioner at Easton, though in exceptional instances prepayments or collections are made by the salesmen and immediately transmitted to Easton. No samples or other merchandise are kept in this Commonwealth. The only property of the petitioner in Massachusetts

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from business carried on within the commonwealth. . . . The net income as defined in section thirty [less certain credits not here involved] shall be allocated as follows: If a foreign business corporation carries on no business outside this commonwealth, the whole of said remainder shall be allocated to this commonwealth. If a foreign business corporation carries on any business outside this commonwealth, the net income taxable under this chapter shall be determined as provided in section thirty-eight."

"Section 38. . . . 2. If the corporation carries on any business outside the commonwealth, the said remainder shall be divided into three equal parts:

"(a) Of one third, such portion shall be attributed to business carried on within the commonwealth as shall be found my multiplying said third by a fraction whose numerator is the value of the corporation's tangible property situated within the commonwealth and whose denominator is the value of all the corporation's tangible property wherever situated.

"(b) Of another third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the expenditure of the corporation for wages, salaries, commissions or other compensation to its employees, and assignable to this commonwealth as hereinafter provided, and whose denominator is the total expenditure of the corporation for wages, salaries, commissions or other compensation to all its employes.

"(c) Of the remaining third, such portion shall be attributed to business carried on within the commonwealth as shall be found by multiplying said third by a fraction whose numerator is the amount of the corporation's gross receipts from business assignable to this commonwealth as hereinafter provided, and whose denominator is the amount of the corporation's gross receipts from all its business.

"3. In a case where only two of the foregoing three rules are applicable, the said remainder of net income of the corporation shall be divided into two equal parts only, each of which shall be apportioned in accordance with one of the remaining two rules. If only one of the three rules is applicable, the

is its office furniture, valued at $573. It maintains no bank account here, its salaries and office rent being paid from its principal office. Incidental expenses are paid from an account not exceeding $1,000 kept by the district sales manager in his own name. No corporate books, records, or meetings are in Massachusetts. There is no controversy as to the facts, valuations or computation of the tax. The issues between the parties relate solely to the correct interpretation of our corporate tax law as to foreign corporations and to the constitutionality of that law in its application to the petitioner. . . . It is rightly conceded by the Attorney General that the petitioner was engaged in this Commonwealth exclusively in interstate commerce."

Having ascertained the necessary items, the Comptroller made the calculations indicated below. The corporation's total net income returned for federal taxation, after allowances, amounted to

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part of the net income received from business carried on within the commonwealth shall be determined solely by that rule.

"4. The value of the corporation's tangible property for the purposes of this section shall be the average value of such property during the taxable year.

"5. The amount assignable to this commonwealth of expenditure of the corporation for wages, salaries, commissions or other compensation to its employees shall be such expenditure for the taxable year as represents the compensation of employees not chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth.

"6. The amount of the corporation's gross receipts from business assignable to this commonwealth shall be the amount of its gross receipts for the taxable year from (a) sales, except those negotiated or effected in behalf of the corporation by agents or agencies chiefly situated at, connected with or sent out from premises for the transaction of business owned or rented by the corporation outside the commonwealth and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises, (b) rentals or royalties from property situated, or from the use of patents, within the commonwealth; provided, that upon application by a corporation which owns or controls substantially all the capital stock of another corporation, or by the corporation so owned or controlled, the commissioner may impose the tax provided for by this chapter upon the income of the two corporations jointly in the same manner as though they were a single corporation, or may, in such other manner as he shall determine, equitably adjust the tax of the applying corporation. . . .

"9. A rule shall not be deemed to be inapplicable merely because all the tangible property or the expenditure of a corporation for wages, salaries,

$707,577.98; $7,602,090.21 (although not quite accurate) was treated as the total value of intangible assets.

Amount of tax measured by net income.

Average value of tangible property in Mass., $573. Divide this by average value all tangible property, $16,992,355.22; multiply resulting fraction by $235,859.33 (⅓ of $707,577.98, *supra*)	=	$8.02
Wages, salaries, etc., assignable to Mass., $11,493.38. Divide this by amount of all wages, salaries, etc., $1,650,614.73; multiply resulting fraction by $235,859.33 (⅓ of $707,577.98, *supra*)	=	1,642.29
Gross receipts assignable to Mass., $343,204.60. Divide this by gross receipts from all business, $10,717,546.43; multiply resulting fraction by $235,859.33 (⅓ of $707,577.98, *supra*)	=	7,552.22
Net income		$9,202.53
2½% of $9,202.53	$230.06	
Less 5% of dividends paid Mass. inhabitants	42.15	
Total according to income		$187.91

Amount of tax measured by corporate excess.

Income assigned to Massachusetts, as above shown, $9,202.53. Divide this by $707,577.98 (entire apportionable net income); multiply resulting fraction by $7,602,090.21 (used for total tangible assets). This yields $98,827.17, which was taken as the value of intangible assets assignable to Massachusetts. The tangible assets, $573, were added and $99,400 became the total accepted value of assets assignable to the State.

Cash value of the company's capital stock was fixed at $16,352,162; all assets, $21,406,098. Divide $99,400 by $21,406,098;

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commissions or other compensation, or the gross receipts of the corporation, are found to be situated, incurred, or received without the commonwealth."

"Section 75. In addition to the methods provided by sections seventy-two and seventy-three [distraint or action in contract], taxes under this chapter, except section sixty-two [not here involved], may be collected by an information brought in the Supreme Judicial Court by the attorney general at the relation of the state treasurer. The Court may issue an injunction upon such information, restraining the further prosecution of the business of the company, association or corporation until such taxes, with interest and costs thereon, have been paid; but no telegraph company accepting the provisions of section fifty-two hundred and sixty-three of the Revised Statutes of the United States shall be enjoined from constructing, maintaining or operating a telegraph line over and along any of the military or post roads of the United States within this commonwealth."

multiply resulting fraction by $16,352,162; the result is $75,932.08 —the "corporate excess." Five dollars per thousand upon this is $379.66.

TOTAL Assessment for 1922 ($187.91 plus $379.66), $567.57.

In the course of its opinion the court below said—

"This tax law, placing as it does both domestic and foreign corporations on common ground as to taxation except so far as essential differences require different treatment in details, follows the policy established in this Commonwealth for many years of levying an excise instead of a property tax on corporate franchises and corporate transaction of business. *Eaton, Crane & Pike Co.* v. *Commonwealth*, 237 Mass. 523.

"The general scheme of this tax law is that an excise is levied on both domestic and foreign business corporations doing business in this Commonwealth. Real estate and machinery used in manufacture by such corporations alone are subject to a local property tax in the city or town where situated. All other personal property, whether tangible or intangible, is exempt from direct or local taxation. The amount of the excise tax is measured as to a foreign corporation, § 39, by the sum of 'An amount equal to five dollars per thousand upon the value of the corporate excess employed by it within the Commonwealth,' and 'An amount equal to two and one half per cent of that part of its net income, as defined in section thirty and in this section, which is derived from business carried on within this Commonwealth,' with a further provision that a minimum tax of not less than one twentieth of one per cent of such proportion of the fair cash value of its shares of capital stock as its assets employed in business in this Commonwealth bear to its total assets employed in business. . . .

"The statute is an attempt to measure the excise on foreign corporations solely by the property and net income fairly attributable to the business done within this Commonwealth. This excise tax is in place of any other tax on personal property within the Commonwealth from which, except as to machinery used in manufacture or in supplying and distributing water, foreign corporations (and also domestic corporations) are expressly exempted by G. L. c. 59, § 5, cl. 16. . . .

"The present tax act imposes the excise with respect to the carrying on of business by foreign corporations within the Common-

wealth. It is an excise for the privilege of having a place of business under the protection of our laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done here by a foreign corporation. The excise is measured by two factors, (1) the value of the corporate excess employed within the Commonwealth, and (2) the net income derived from business within the Commonwealth.

"1. The value of the corporate excess employed in the Commonwealth as a factor of the tax is not measured by the capital stock of the corporation. If it were, it would be invalid. *International Paper Co.* v. *Massachusetts,* 246 U. S. 135. It is measured by the value of the property of the foreign corporation, including its franchise, employed in the Commonwealth, after certain deductions are made. It seems to us that this factor of the tax stands under the protection of several decisions of the Supreme Court of the United States. . . .

"It is manifest as matter of common business knowledge that commerce within this Commonwealth yielding to the petitioner annual gross receipts of $424,982.70 must have involved credits, bills receivable and obligations to it of considerable amounts. No contention to the contrary has been urged by the petitioner. Such credits, bills receivable and obligations might be made subject to direct taxation within the Commonwealth by appropriate legislation under numerous decisions of the United States Supreme Court. Such credits, bills receivable and obligations constitute a part of 'the value of the assets' of the petitioner 'employed in . . . [its] business within the Commonwealth' used as the basis of ascertaining 'the corporate excess' of the petitioner 'employed within the Commonwealth' upon which this factor of the excise is calculated. . . .

"2. The tax, as measured by the net income from business transacted in Massachusetts as a factor, is dependent upon net profits derived solely from interstate commerce. But there is no discrimination in the statute against interstate commerce. This net income is used as a measure applicable to all corporations alike. While not an income tax according to strict definition, in substance it affects net income alone, is measured by net income alone, is reasonable in amount and incidence, and is payable out of net income. . . .

"The tax considered as a whole with both its main factors is general in nature and reasonable in amount. The tax upon the petitioner in substance and effect, so far as concerns the factor of its corporate excess employed within the Commonwealth, is levied upon its tangible personal property within the Commonwealth, upon the credits due it from debtors within this Commonwealth, and upon the exercise of its franchise within this Commonwealth, and, so far as concerns the factor of its income, upon the net income derived from business in this Commonwealth after all losses and expenses have been paid. It is not directed against interstate commerce or property outside the State but is confined to business done, property located, capital employed and net income earned within the Commonwealth. It affects interstate commerce indirectly and is not an immediate burden upon it. It affords to the State only a fair and reasonable revenue for the maintenance of the government, the benefits from the protection of which the petitioner enjoys. Our conclusion is that the law thus construed, as applying to a foreign corporation using a part of its property exclusively for interstate commerce within the Commonwealth, violates no guaranty established by the Constitution of the United States. The tax statute, therefore, is interpreted as applying to a corporation engaged in business within the Commonwealth as is the petitioner."

Counsel for the Commonwealth assert: "The present tax law imposes an excise on foreign corporations for the privilege of doing business in Massachusetts under the protection of its laws and with the financial, commercial and other advantages flowing therefrom, measured solely by the property and net income fairly attributable to the business done within the State. Payment of the tax is not made a condition precedent to the doing of business. Collection of the tax is to be made by ordinary methods. There is no discrimination either against foreign corporations or against interstate commerce." "The taxes complained of were excises and not property taxes." "Being excises these taxes are not taxes *on* property or net income, but taxes *measured by* property and net income, used in or derived from business done in Massachusetts." See *Judson Freight Forwarding Co.* v. *Commonwealth*, 242 Mass. 47.

This view of the nature of the exaction was adopted by the court below, and we think it is the correct one. The right to lay taxes on tangible property or on income is not involved; and the inquiry comes to this: May a State impose upon a foreign corporation which transacts only interstate business within her borders an excise tax measured by a combination of two factors—the proportion of the total value of capital shares attributed to transactions therein, and the proportion of net income attributed to such transactions?

Cheney Brothers Co. v. *Massachusetts,* 246 U. S. 147, 153, 154, necessitates a negative reply. Under St. 1909, c. 490, Part III, §56, the State demanded an excise of a foreign corporation which transacted therein only interstate business. The excise was laid upon the corporation and the basis of it the same as in the present cause. This court said: "We think the tax on this company was essentially a tax on doing an interstate business and therefore repugnant to the commerce clause." Here also the excise was demanded on account of interstate business. A new method for measuring the tax had been prescribed, but that cannot save the exaction. Any such excise burdens interstate commerce and is therefore invalid without regard to measure or amount. *Looney* v. *Crane,* 245 U. S. 178, 190; *International Paper Co.* v. *Massachusetts,* 246 U. S. 135, 142; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259; *Texas Transport & Terminal Co.* v. *New Orleans,* 264 U. S. 150.

International Paper Co. v. *Massachusetts* considered an excise upon a corporation doing both local and interstate business, measured by its capital stock. St. 1909, c. 490; St. 1914, c. 724. Pertinent cases were cited and discussed and the tax declared "unconstitutional and void as placing a prohibited burden on interstate commerce and laid on property of a foreign corporation located and used beyond the jurisdiction of the State." Payment as a condition precedent to the doing of any business was not a controlling circumstance. The opinion recognizes the State's right to demand excises of foreign corporations in respect of intrastate business unless the exaction is really a tax on interstate business or property beyond the State. Under this principle certain of the complaining corporations in *Cheney Brothers Co.* v. *Massachusetts, supra,* were properly taxed. Plaintiff in error did no local business, and there was no proper foundation for the excise.

It must now be regarded as settled that a State may not burden interstate commerce or tax property beyond her borders under the

guise of regulating or taxing intrastate business. So to burden interstate commerce is prohibited by the Commerce Clause; and the Fourteenth Amendment does not permit taxation of property beyond the State's jurisdiction. The amount demanded is unimportant when there is no legitimate basis for the tax. So far as the language of *Baltic Mining Co.* v. *Massachusetts,* 231 U. S. 68, 87, tends to support a different view it conflicts with conclusions reached in later opinions and is now definitely disapproved.

Union Tank Line Co. v. *Wright,* 249 U. S. 275, 282, *et seq.,* pointed out the limitations which must be observed when property used in interstate commerce is valued for purposes of taxation by a State. We there declined to follow the rule applied in *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 26, and held that determination of real value with fair accuracy is essential. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of interstate transactions.

The local business of a foreign corporation may support an excise measured in any reasonable way, if neither interstate commerce nor property beyond the State is taxed. *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, approved such an excise measured by income reasonably attributed to intrastate business; but nothing there said was intended to modify well established principles. It must be read with the essential facts in mind. Local business was a sufficient basis for the excise, and there was no taxation of interstate commerce or property beyond the State. Of course, the opinion does not support the suggestion that the present statute is free from the fatal objections to the former one because payment of the tax is no longer a condition precedent to carrying on any business. It cites approvingly *St. Louis S. W. Ry.* v. *Arkansas,* 235 U. S. 350, 364; and there this court said—

"So far as the commerce clause is concerned, it seems to us that the principles upon whose application the present decision must depend are those set forth in *Postal Tel. Cable Co.* v. *Adams,* 155 U. S. 688, 695, where the court, by Mr. Chief Justice Fuller, said: 'It is settled that where by way of duties laid on the transportation of the subjects of interstate commerce, or on the receipts derived therefrom, or on the occupation or business of carrying it on, a tax is levied by a State on interstate commerce, such tax-

tion amounts to a regulation of such commerce and cannot be sustained. But property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, or a tax may be imposed on the corporation on account of its property within a State, and may take the form of a tax for the privilege of exercising its franchises within the State, if the ascertainment of the amount is made dependent in fact on the value of its property situated within the State (the exaction, therefore, not being susceptible of exceeding the sum which might be leviable directly thereon), and if payment be not made a condition precedent to the right to carry on the business, but its enforcement left to the ordinary means devised for the collection of taxes.' ''

The excise challenged by plaintiff in error is not materially different from the one declared unconstitutional in *Cheney Brothers Co.* v. *Massachusetts,* and cannot be enforced against a foreign corporation which does nothing but interstate business within the State. The introduction of an extremely complicated method for calculating the amount of the exaction does not change its nature or mitigate the burden.

The decrees of the court below must be reversed and the causes remanded for further proceedings not inconsistent with this opinion.

Mr. Justice BRANDEIS dissents.

A true copy.

Test:

Clerk, Supreme Court, U. S.